

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

DECISION AND RECOMMENDATIONS

NO. 2 (HOME) HEATING OIL

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UNITED STATES DEPARTMENT OF ENERGY
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DECISION AND RECOMMENDATIONS
OF THE OFFICE OF HEARINGS AND APPEALS
OF THE DEPARTMENT OF ENERGY

Docket No. DEX-0123 - NO. 2 (HOME) HEATING OIL

I. INTRODUCTION

This proceeding was initiated on January 13, 1978, when the Deputy Secretary of the Department of Energy directed the Office of Hearings and Appeals to conduct an evidentiary hearing with regard to certain issues involving the distribution and sale of No. 2 heating oil. 43 Fed. Reg. 2917 (January 20, 1978). It was envisioned that the findings and recommendations drawn from the hearing record would form the basis of any further regulatory actions of the Department relating to the allocation of heating oil and the prices that could be charged for the product.

The proceeding which ensued was unique in a number of respects. It signified the first time that a major DOE regulatory determination would be based in substantial part on the factual record assembled through an evidentiary hearing. In

addition, this proceeding was the first occasion in which staff offices of the Department published findings and permitted the individuals who were responsible for making the findings to be cross-examined by adversary parties.

The evidentiary hearing focused on "the performance of all levels of distribution of the heating oil industry and the need for any further regulatory action." Id. at 2920. It was convened on August 21, 1978 and was adjourned seven days later. The final oral arguments of the parties were heard on October 4, 1978.

The administrative record reveals both the innovative procedural features of the proceeding as well as the breadth of the substantive issues. (Appendices A through I at the end of this Decision present a list of all the material that comprise the administrative record). In view of the scope of the proceeding, it would be useful to describe first the posture of No. 2 heating oil in relation to the current DOE regulatory program.

More than 16 million homes and commercial buildings in the United States rely on middle distillates, particularly No. 2

heating oil, as their principal energy source for space heating. In addition, domestic sales of middle distillates totaled 51,386 million gallons during 1977. No. 2 heating oil accounted for a major share of these sales.

No. 2 heating oil is one of the few petroleum products which is not produced and marketed in a regulated environment. On July 1, 1976, the Federal Energy Administration ("FEA") exempted No. 2 heating oil from the system of federal price and allocation controls that still pertain to most other petroleum products. Prior to that date, however, the product was subject to restrictions on price and supply relationships imposed under the Federal Government's Mandatory Petroleum Price and Allocation Regulations. (See generally, Mandatory Petroleum Price and Allocation Regulations, 10 CFR, Parts 211 and 212). Those Regulations had been promulgated by the President in order to carry out the legislative directive contained in the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. Section 751 et seq. ("EPAA"). Subsequent to the exemption, the sale of No. 2 heating oil at all levels of the industry has been unconstrained by any regulatory restrictions.

The Office of Hearings and Appeals' present inquiry into the No. 2 heating oil industry focuses upon the behavior of prices and supplies during the period of deregulation. Of the many issues considered at the evidentiary hearing, the most central issue was whether competitive market forces, when acting free of price and allocation controls, have functioned and would continue to function in such a way as to achieve the statutory objectives set forth by Congress in Section 4(b)(1) of the EPAA.1/

Three of the parties in this proceeding, the Office of Fuels Regulation of the DOE Economic Regulatory Administration, the Antitrust Division of the Department of Justice, and the National Oil Jobbers Council, strongly argued that the evidence indicates that the question must be answered affirmatively. The other party, the Energy Policy Task Force of the Consumer Federation of America, argued that the contrary position must be taken and that price and allocation controls must be reimposed in order to achieve the objectives of the EPAA. However, it is important to recognize at the outset that any regulatory action reimposing price or allocation controls must be based on Section 12(f) of the EPAA. That provision states in part:

With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specification of price or the manner for determining the price, of any such oil or refined product category upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in Section 4(b)(1).
15 U.S.C. Section 757(b)(1) (1976). . .

In order to make a judgment as to whether the evidence supports the position that the reimposition of controls on No. 2 heating oil "is necessary to attain, and is consistent with the objectives specified in Section 4(b)(1)", it would be useful to consider first the basis upon which the Federal Energy Administration originally established the control program. The ensuing parts of this Decision will then review (i) the FEA's decision to exempt No. 2 heating oil from price and allocation controls, (ii) the structure of the present proceeding, and (iii) the issues and evidence

considered at the evidentiary hearing, and (iv) the recommendations that emerge from the evidence taken as a whole.

II. REGULATORY BACKGROUND

A. The Regulatory Setting Prior to the Exemption of No. 2 Heating Oil from Price and Allocation Controls

Price controls first became a significant factor in the heating oil industry in 1971. Initially, these controls were implemented as part of several major regulatory mechanisms established under the Economic Stabilization Program and applied to all sectors of the economy. Economic Stabilization Act of 1970, as amended, 12 U.S.C. Section 1904 note. The objective of these regulatory programs was to curb the rate of inflation which the entire economy was then experiencing. At the beginning of 1973, however, rising oil prices were singled out as a particularly serious inflationary threat to economic stability. Therefore, the general price controls initiated under Phase IV, the final phase of the Economic Stabilization Program, included regulations specifically designed to constrain the increasing prices of petroleum products. The Phase IV controls, which were instituted on August 22, 1973, established a comprehensive system for controlling the prices of crude oil and refined petroleum products at the producing, refining and distributing levels.

of the industry. Cost of Living Council Phase IV Regulations, 38 Fed. Reg. 22538 (August 22, 1973) (as codified in 6 CFR Part 150).

By coincidence, these controls were in effect in October of 1973 when the Arab nations placed an embargo on oil destined for the United States. According to published reports, the Arab embargo produced a severe shortage of petroleum supplies in the United States. In response to these conditions, Congress found that a "national energy crisis" existed and it enacted the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. Section 751 et seq. ("EPAA"). Comprehensive regulations were issued pursuant to the EPAA on January 14, 1974 and they established a detailed framework for determining maximum prices and the mandatory allocation of crude oil and refined petroleum products at all levels of the petroleum industry. Mandatory Petroleum Allocation and Price Regulations, 39 Fed. Reg. 1924 (January 15, 1974) (as codified in 10 CFR, Chapter II). The purpose of this regulatory program, known as the Mandatory Petroleum Price and Allocation Regulations, was, inter alia, to preserve an economically stable and competitive industry and to ensure the equitable distribution of petroleum products at reasonable

prices in view of the exigencies created by the supply shortage. The agency responsible for the administration and enforcement of these regulations was the Cost of Living Council. Later, this authority was exercised by the Federal Energy Office and finally transferred to the Federal Energy Administration. These controls, which remain in place for crude oil, motor gasoline, NGL's and other products, governed the pricing and distribution of No. 2 heating oil until July 1, 1976.

B. The FEA Decision to Exempt No. 2 Heating Oil from Price and Allocation Controls

Towards the latter part of 1975, the FEA was urged by several members of Congress to begin exempting individual refined petroleum products from price and allocation controls in view of the fact that supplies had returned to normal levels. In response, the FEA conducted a preliminary analysis of the probable effect of deregulation of middle distillates (i.e., home heating oil, No. 2 diesel fuel and kerosene) on the prices and supplies of those products. The results of the FEA's analysis were published on April 21, 1976 in a document entitled "Preliminary Findings and Views Concerning the

Exemption of Middle Distillates from the Mandatory Petroleum Allocation and Price Regulations." 41 Fed. Reg. 17512 (April 26, 1976). In that document, the FEA tentatively found that:

- (i) middle distillate products were no longer in short supply and the exemption of the product from price and allocation controls would not adversely affect the supply of any other oil product;
- (ii) competition and market forces were adequate to prevent consumers from being charged inequitable prices; and
- (iii) the exemption of middle distillates from allocation and price controls would be consistent with the other objectives stated in Section 4(b)(1) of the EPAA. Id. at 17513.

On the basis of these findings, the FEA publicly announced a proposal to exempt No. 2 heating oil and other middle distillates from the Mandatory Petroleum Allocation and Price Regulations. Ibid. Because of the significant impact which such an

action would have on the industry and on consumers of middle distillates, the FEA held a public hearing and solicited written comments from interested parties. As a result, written and oral comments were received from one hundred forty-seven interested parties, including firms operating in the industry, consumers, state governments, and trade associations. In general, the public response to the proposed deregulation of middle distillates was very favorable. However, several commenters were concerned that in the absence of some control mechanism, unforeseen shortages in the supplies of No. 2 heating oil or other middle distillates might result in inequitable prices or inadequate supplies to consumers.

After considering the opinions advanced by the public, the FEA concluded that its initial view that No. 2 heating oil and other middle distillates should be exempted was correct and in the best interest of the public. Pursuant to Section 551 of the Energy Policy and Conservation Act of 1975, 42 U.S.C. Section 751, et seq., each house of Congress must have an opportunity to review any exemption before it can become effective. Therefore, in a Notice published in the Federal Register on June 16, 1978, the FEA announced that it

had submitted to Congress for consideration, amendments to the Mandatory Petroleum Price and Allocation Regulations which provided for the exemption of middle distillates from price and allocation controls. 41 Fed. Reg. 24516 (June 16, 1976). As required by Section 12 of the EPAA, the amendments were accompanied by a report containing the FEA's factual findings and conclusions supporting its decision to deregulate middle distillates. That report was entitled "Findings and Views Concerning the Exemption of Middle Distillates from the Mandatory Petroleum Allocation and Price Controls." Essentially, the report incorporated the earlier findings made by the FEA during its preliminary analysis of the effects of deregulation. In those findings, the FEA concluded that:

- (1) Middle distillates were not in short supply and projected supplies would be sufficient to meet future demand.
- (2) The exemption of the product from price and allocation controls would not affect adversely the supplies of any other oil or refined petroleum product subject to the EPAA.

- (3) Competition and market forces existing in the industry were adequate to prevent consumers from being charged inequitable prices for middle distillates. However, prices would be expected to rise over time as the cost of domestic and foreign crude oil increased. The increase in price for middle distillate was projected to be one cent per gallon for the first two years after decontrol.
- (4) The exemption would enhance competition in the industry by permitting purchasers to seek suppliers offering the lowest prices through competitive bidding and thereby exert downward pressure on existing market prices.
- (5) The exemption would contribute to attaining to the maximum extent possible, the objectives set forth in Section 4(b)(1) of the EPAA. "Findings and Views."

The FEA also stated that the price and allocation regulations which had been issued pursuant to the EPAA were designed to deal with emergency shortage conditions and that those

conditions no longer prevailed with respect to middle distillates. Id. at 24517. Accordingly, the FEA concluded that it was now appropriate to rely once again on existing market mechanisms to govern the pricing and allocation of No. 2 heating oil and other middle distillates. Since the amendments specifying the exemption of middle distillates were not disapproved by either house of Congress, they became effective on July 1, 1976. Mandatory Petroleum Allocation and Price Regulations, 10 CFR Section 210.35.

C. The Monitoring of No. 2 Heating Oil Prices in the Period Following the Exemption

In response to concerns expressed by some members of Congress at the time the decision to decontrol middle distillates was made, the FEA committed itself to undertake certain actions to ensure that unwarranted price increases would not occur once controls were removed. Consequently, throughout the period of decontrol, the FEA and its successor, the Economic Regulatory Administration of the DOE, implemented various programs for monitoring middle distillate price changes. Because of its importance as a major source of heating fuel in many parts of the country, No. 2 heating oil was the primary focus of these programs.

The first middle distillate monitoring program was implemented by the FEA during the 1976-77 heating season. Its main feature was the comparison of national price indices for No. 2 heating oil with the actual prices charged to ultimate consumers. The index prices were calculated using as a base the price of No. 2 heating oil immediately prior to the beginning of decontrol (June 1976). However, adjustments were made on the index price to reflect changes in costs and seasonal price variations. These indices were designed to approximate the price which would have been charged in the market if controls had remained in effect. They were considered by the FEA to be a reasonable indication of equitable prices to consumers. In addition, the FEA conducted a survey of national and regional prices for No. 2 heating oil for all end-users of the product. The survey prices were then compared to the national index prices for the corresponding period. At the time the monitoring program was initiated, the FEA stated that if actual average national prices for No. 2 heating oil were found to exceed the national index prices, public hearings would be held to ascertain the causes and appropriate remedies for the excessive price increases. This 1976-77 monitoring program also included a system of regional price indices in order to isolate any

unduly disproportionate price increases occurring within certain sections of the country. 41 Fed. Reg. 41155 (September 21, 1976).

The results of the 1976-77 monitoring program indicated that actual average prices for No. 2 heating oil had exceeded the corresponding index price both nationally and regionally on several occasions during the 1976-77 heating season. Average heating oil prices to all ultimate consumers in the country exceeded the national index levels during several parts of April 1977. In addition, on a regional basis, the index levels for the North Central Region were exceeded by actual average prices during the months of January, March, and April 1977. The index price for the Southern Region was also exceeded in April 1977. As a consequence, the FEA announced that it would initiate a proceeding in order to solicit the views of the public as to the cause of the price increases and the need for further regulatory action regarding No. 2 heating oil prior to the 1977-78 heating season. 42 Fed. Reg. 54444 (October 6, 1977).

Accordingly, during the months of July and August 1977, the FEA held regional and national hearings for the purpose of

determining what further action, if any, should be taken with respect to middle distillate prices. After considering the statements presented at these hearings and written comments submitted in the matter, the FEA decided not to reimpose regulatory controls on middle distillates, but to instead initiate a program of continued and expanded monitoring. Moreover, since the hearings and comments indicated that the greatest public concern related to residential prices of No. 2 heating oil, the monitoring program which was eventually adopted for use during the 1977-78 heating season was confined to No. 2 heating oil.

On October 1, 1977, the regulatory authority which previously had been exercised by the FEA was transferred to the Economic Regulatory Administration (ERA) of the newly created Department of Energy. As a result, the ERA assumed the responsibility for administering the monitoring program which was eventually adopted for use during the 1977-78 heating season.

The 1977-78 monitoring system was designed to provide more insight into the causes for any variations in the price of No. 2 heating oil to ultimate consumers. Since the price eventually charged to ultimate consumers is a function of

the prices charged at the three levels of production and distribution in the industry - refining, wholesaling, and retailing - the ERA attempted to track the progression of No. 2 heating oil prices at each of these levels. In order to perform this type of analysis, the ERA monitored the prices of No. 2 heating oil on a national and regional basis at each of the three marketing levels. In addition, the ERA collected data which indicated the gross margins realized by firms operating at each marketing level. Gross margins represent (on a per gallon basis) the difference between a firm's selling price and the cost at which it purchases the product. Therefore, increases in the gross margin of a firm reflect the extent to which the firm itself has increased the price of the product in the process of refining or reselling it. By monitoring the gross margins of firms operating at the refining, wholesaling, and retailing tiers of the industry, the ERA sought to ascertain the extent to which the price of No. 2 heating oil had been increased by firms operating at each tier.

As part of its 1977-78 monitoring program, the ERA also attempted to evaluate the reasonableness of No. 2 heating oil prices to ultimate consumers. For this purpose, the ERA

developed a new system of index prices and "benchmark" gross margins which it compared to prevailing prices and actual gross margins. At the refining level, the ERA established national and regional price indices to compare with refiners' actual prices. These price indices estimated the price levels that refiners would have been permitted to charge in sales of No. 2 heating oil to non-ultimate consumers (wholesalers and retailers) under price controls. With respect to the wholesaling and retailing segments of the industry, the ERA devised "benchmark" gross margins for comparison with the actual gross margins realized by firms operating in these sectors. The benchmarks were utilized by the ERA as an indicator of reasonable gross margins for firms in the industry in view of changes in non-product costs, inflation, and seasonal variations. Since the price charged by firms at the wholesaling and retailing levels consists of the cost of the product to the firm and the gross margin which it realized in reselling the product, this methodology enabled the ERA to ascertain the degree to which the price of No. 2 heating oil increased in wholesale and retail sales. 43

Fed. Reg. 2917 (January 20, 1978).

III. THE EVIDENTIARY HEARING

A. Structure of the Evidentiary Hearing

The ERA originally announced and described its 1977-78 monitoring program on January 13, 1978. 43 Fed. Reg. 2917 (January 20, 1978). At the same time, the ERA stated that it would publish a summary of its reporting data and findings with respect to No. 2 heating oil prices during the 1977-78 heating season. This report, entitled "Analysis of No. 2 Heating Oil Prices for the 1977-78 Heating Season," was published by the Office of Fuels Regulation of the ERA on June 30, 1978. (It later became the first formal documentary evidence submitted at the evidentiary hearing). The Department of Energy also announced that a hearing would be held before the Office of Administrative Review in August 1978 regarding No. 2 heating oil. The DOE indicated that the hearing would be an evidentiary hearing, open to the public, and that its purpose would be to evaluate the performance of the No. 2 heating oil industry during the period of decontrol. The purpose of the hearing was to consider the need for further regulatory action in light of the information presented at the hearing. Id. at 2920. On March 30, 1978, the Office

of Hearings and Appeals of the DOE was created and that Office assumed the responsibilities which had been exercised by the Office of Administrative Review. Consequently, the Office of Hearings and Appeals was ultimately responsible for and conducted the August 1978 evidentiary hearing.

Prior to convening the evidentiary hearing, the Office of Hearings and Appeals conducted extensive preliminary proceedings in order to establish the procedural format to be used at the hearing. The Office of Hearings and Appeals initiated these proceedings on April 18, 1978, by promulgating on an interim basis certain rules of procedure for the hearing. 43 Fed. Reg. 17393 (April 24, 1978). All interested parties were invited to submit written comments on those rules. As a result, comments were received from seventeen persons representing private and governmental interests. After considering those comments, several modifications were made in the interim rules and the final procedures were then issued to govern the conduct of the evidentiary hearing. 43 Fed. Reg. 24588 (June 6, 1978).

The rules of procedure established (i) the manner in which interested persons would be selected to participate as

parties in the evidentiary hearing, (ii) the type of information regarding No. 2 heating oil prices that could be obtained from the ERA Office of Fuels Regulation, and (iii) the conduct of different phases of the proceeding leading up to the evidentiary hearing. Provisions were also made for the presentation of evidence, cross-examination, and oral argument. However, other details involving more specific procedures to be used at the evidentiary hearing itself were not finalized until a later date.

According to the rules of procedure, any person wishing to participate in the evidentiary hearing could submit a Petition to Intervene with the Office of Hearings and Appeals. Each Petition was to provide a description of the petitioner's business or organizational activities and the interests which it proposed to represent at the hearing. In addition, each petitioner was asked to indicate the reasons why its participation in the evidentiary hearing would further the scope and usefulness of the hearing.

Thirteen Petitions to Intervene were received by the Office of Hearings and Appeals from various consumer groups, trade associations, federal and state agencies, and firms in the

petroleum industry.^{2/} The Office of Hearings and Appeals immediately determined that three of the petitioners, the Energy Policy Task Force of the Consumer Federation of America (EPTF), the American Petroleum Institute (API), and the Antitrust Division of the Department of Justice (DOJ) should be designated as parties to the evidentiary hearing. Energy Policy Task Force of the Consumer Federation of America, et al., 1 DOE Par. 82,565 (June 2, 1978). The Office of Fuels Regulation of the ERA, which was the DOE's primary data gatherer regarding No. 2 heating oil prices, had already indicated its willingness to participate as a party.

With respect to the remaining petitioners, the Office of Hearings and Appeals held a conference on June 6, 1978, to elicit further comments on the reasons why they should be accorded party status and to discuss the possibility of consolidating certain petitioners into classes and designating one petitioner to represent a class. After considering the views presented at the June 6 conference, the Office of Hearings and Appeals designated two of these petitioners, the National Oil Jobbers Council (NOJC) and the Atlantic Richfield Company (ARCO) as parties to the proceeding. In addition, the petitions submitted by the State of Wisconsin,

the Assembly of the State of New York and the Honorable Toby Moffett (the Member of Congress from the 6th District of Connecticut) were granted as requested and the position of these parties consolidated with the EPTF position. As stated above, EPTF had previously been designated a participant in the hearing. American Petroleum Refiners Association, et al., 1 DOE Par. _____ (June 9, 1978).

In reaching these determinations, the Office of Hearings and Appeals evaluated the relative contributions which the petitioners could be expected to make to the evidentiary hearing. Of primary concern to the Office of Hearings and Appeals was the need for adequate representation at the hearing for all of the various interest groups that would be affected by the DOE's ultimate action regarding No. 2 heating oil. Therefore, the Office of Hearings and Appeals sought the participation of organizations which would be capable of representing a broad range of interest groups possessing a similar point of view. In this regard, it found that EPTF was particularly qualified to represent the viewpoint of the consumer. EPTF was at that time part of the largest consumer organization in the United States and represents more than 50 consumer and consumer-related organizations throughout

the country. The position which API sought to represent at the hearing was also an important one. API is the largest trade association in the petroleum industry, and its membership includes firms and individuals experienced in the exploration, production, refining, and marketing of petroleum products. API was therefore selected to represent the viewpoint of firms in the petroleum industry. The Office of Hearings and Appeals also believed that it would be desirable to have the specific viewpoints of individual firms in the marketing sector of the petroleum industry presented at the hearing. Consequently, NOJC and ARCO were also designated as parties to the proceeding. NOJC is a federation of 43 state and regional trade associations representing thousands of small marketers of refined petroleum products. Its members account for approximately 75 percent of the No. 2 heating oil sold in this country. ARCO, on the other hand, could be viewed as typifying the position of a major integrated firm in the industry which is a significant producer and marketer of No. 2 heating oil.

As stated above, the other organization accorded party status was the Anti-trust Division of the Department of Justice (DOJ) and the Office of Fuels Regulation (OFR) of

the ERA. DOJ was designated a party on the basis of its extensive experience in the specialized area of competitive economic analysis and market regulation. OFR voluntarily participated in the hearing as a party and represented a point of view developed on the basis of its studies and analyses of No. 2 heating oil prices. Energy Policy Task Force of the Consumer Federation of America, et al., supra.

In the midst of the preliminary proceedings, API and ARCO withdrew their participation. However, the absence of those parties did not seriously affect the scope of the inquiry since other parties, notably NOJC and DOJ, presented points of view which were similar to the positions which API and ARCO had taken. However, the type of evidence which API and ARCO might have been able to submit regarding competition at the refining level of the industry was not presented and this factor has affected to a certain extent our conclusions with regard to the issue of whether competition is adequate at the refining level. (pp. 101-126 infra.)

In the course of preparing for the evidentiary hearing, several steps were taken to assure that the procedural and substantive format to be used at the hearing was well defined

and understood by the parties. Initially, each party was required to serve a document upon all other parties indicating the factual position which it proposed to establish with respect to the issues to be addressed at the hearing. The document included a description of the manner in which the party intended to prove the validity of its factual representations. The report which OFR published on June 30, 1978 regarding its analysis of the data gathered in connection with the 1977-78 monitoring program, although exclusively factual in nature and therefore different from the type of material sought from the other parties, was deemed to constitute OFR's factual position. Following the submission of these statements, each party was permitted to file comments responding to the statements of factual position submitted by other parties as well as the June 30 Report of the OFR.

In addition, the parties were permitted to conduct discovery with respect to relevant issues. The discovery mechanism served as a device for the parties to obtain the fullest possible knowledge of the issues and facts prior to the hearing. Specifically, the use of discovery was intended to allow the parties to narrow differences between them and to clarify the basic issues. To this extent, the pre-hearing

discovery was helpful to the Office of Hearings and Appeals in conducting an expeditious and meaningful evidentiary hearing.

As part of the discovery process, the Office of Hearings and Appeals granted a request made by one of the parties, EPTF, to depose certain witnesses of the OFR. These depositions took place on August 10, 1978 and August 14, 1978, and were attended by all the parties. The deposed persons were staff persons of the Economic Regulatory Administration who had been actively involved in the collection and analysis of data which had been carried out in connection with the ERA's 1977-78 monitoring program. The transcripts of those depositions were subsequently submitted to the Office of Hearings and Appeals and have been included in the record of the proceeding.

Discovery also included the exchange of information among the parties prior to the hearing. Certain information which was provided to all the parties by OFR elaborated upon the data which was collected pursuant to the 1977-78 monitoring program. In addition, each party was required to exchange with every other party any exhibits or written documents

which it intended to introduce at the hearing. Exchanges of this type were required to be completed 24 hours in advance of the presentation of that material at the hearing.

The procedural format to be followed at the evidentiary hearing was delineated in a Decision and Order which the Office of Hearings and Appeals issued on July 14, 1978. In that determination, the Office of Hearings and Appeals established rules which related to (i) the burden of proof, (ii) the standard of proof, and (iii) the admissibility of evidence at the evidentiary hearing. With respect to the burden of proof, the Office of Hearings and Appeals indicated that the burden of establishing that a particular factual assertion should be accepted as true would be borne by the party making that assertion. The validity of disputed factual issues would be established by a preponderance of the evidence. Under this standard, evidence preponderates when it is more convincing to the trier of fact than opposing evidence. The use of presumptions, although requested by a number of parties, was rejected. Any evidence deemed as material or germane to the contested issues to be addressed at the hearing was admitted. No. 2 (Home) Heating Oil (Rules of Procedure), 2 DOE Par. 82,518 (July 14, 1978).

A preliminary list of the issues that would be addressed at the hearing was also prepared. No. 2 (Home) Heating Oil (Proposed Decision and Order, Case No. DEH-0022) (August 10, 1978)). A conference was held to discuss the proposal, and after amendments and additions were made, the Office of Hearings and Appeals issued a Decision on August 15, 1978 specifying the issues to be considered at the evidentiary hearing. No. 2 (Home) Heating Oil, 2 DOE Par. _____ (August 15, 1978). In that Decision, the issues were outlined as follows:

Statement of Issues

- I. The nature of the marketing of home heating oil since the exemption of the product from price and allocation controls and the impact of deregulation in view of the objectives stated in Section 4(b)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA).
- A. The extent to which prices have increased at each level of distribution since the exemption of home heating oil from federal price and allocation controls.

B. The behavior of prices which were charged to purchasers of home heating oil after deregulation.

1. Whether price increases, if any, at the various levels of distribution have been greater than they would have otherwise been if controls had been in effect.

2. The degree to which increases in price, if any, reflect changes in costs. (In other words, whether the deregulation of home heating oil has permitted sellers to increase their prices to an extent which exceeds their increased costs.)

3. The nature of any adverse effects experienced by ultimate consumers in the United States or in particular localities or regions of the nation as a result of price increases in home heating oil.

- C. The economic viability of firms which operate in the various market sectors of the home heating oil industry.
 - D. The adequacy of the supply of home heating oil at each of the levels of distribution of the home heating oil industry in the period since home heating oil was exempted from price and allocation controls.
 - E. A comparison of the behavior of the home heating oil market in the period following deregulation of that product with the predictions and assumptions with respect to the behavior of the market during deregulation which the FEA made in 1976 when home heating oil was exempted from federal price and allocation controls.
- II. The competitive nature and market structure of the home heating oil industry.

- A. The degree of competition which exists among firms at the various marketing levels of the home heating oil industry.
- B. Whether competitive market forces have satisfactorily constrained price increases in sales to residential customers, including the extent to which prices have increased as a result of noncompetitive behavior by firms in the industry.
- C. The propriety of taking regulatory action in response to a finding that increases in home heating oil prices have occurred as a result of noncompetitive behavior by firms in that industry.
 - 1. Whether the existence of noncompetitive behavior is an appropriate basis for a decision to reimpose some form of regulation on the home heating oil industry.

2. A comparison of the effects of some type of further regulatory action by the DOE with the effects of various other actions, e.g., antitrust enforcement.

D. A comparison, in view of the objectives stated in Section 4(b)(1) of the EPAA, of the competitive nature and market structure of the home heating oil industry in the period following deregulation with the predictions and assumptions which the FEA made regarding the industry when home heating oil was exempted from federal price and allocation controls.

III. The impact of further regulatory action, including partial or complete reimposition of price and allocation controls or further monitoring, on the home heating oil industry and market.

- A. The impact on the economic viability of firms in the industry.
- B. The impact on competition in the various marketing sectors and geographic regions of the home heating oil market.
- C. The effect on the price, supply of and demand for home heating oil. Ibid.

The evidentiary hearing was convened on August 21, 1978 and presided over by Melvin Goldstein, Director of the Office of Hearings and Appeals. At the outset of the hearing, each party gave an opening statement summarizing its position regarding the need for further regulation of No. 2 heating oil. Following the opening statements, each party began the introduction of witnesses and evidence to make its direct presentation.^{3/} Presentations of direct cases were made in the following order:

- (1) The Office of Fuels Regulation of the Department of Energy, represented by the Office of General Counsel of the Department of Energy.

(2) The National Oil Jobbers Council.

(3) The Antitrust Division of the Department of Justice.

(4) The Energy Policy Task Force of the Consumer Federation of America.

B. Positions Advocated by the Parties at the Evidentiary Hearing

In its affirmative case, OFR contended that neither price nor allocation controls should be reimposed at any level of the No. 2 heating oil industry. In this regard, OFR alleged that No. 2 heating oil prices had not increased sufficiently to warrant the reimposition of controls in order to satisfy the objectives stated in Section 4(b)(1) of the EPAA. In support of its position, OFR presented several witnesses who testified as to the changes in No. 2 heating oil prices since decontrol. Two of OFR's witnesses, William Gillespie and Andrew Drance, were employees of the DOE and had actively participated in drafting and implementing the programs designed to monitor the prices of No. 2 heating oil during

each of the past two heating seasons since decontrol.⁴/ At the hearing, each of these witnesses introduced a number of exhibits comprised of statistical studies and analyses which examined No. 2 heating oil prices and the costs experienced by firms in the industry over the period of decontrol. (OFR Exhibits 1-7, 12-14 and 24-26.)⁵/ In addition, OFR submitted as evidence at the hearing a substantial amount of price and cost data which is discussed in detail in the following Section. (pp. 46-61 infra.) Much of this evidence was derived from the comprehensive studies of No. 2 heating oil prices during the winters of 1976-77 and 1977-78 which the ERA conducted in connection with its monitoring programs.

OFR also advanced the argument that supplies of No. 2 heating oil have been adequate to meet demand on a national basis and are likely to remain so during the 1978-79 heating season. In support of this claim, OFR produced data relating to the supplies of No. 2 heating oil relative to the demand for the product. (OFR Exhibits 8-12.) Additionally, witnesses presented by OFR testified that during a period in which supplies are ample, certain features of the regulatory program prevent or hinder the operation of a free market and thereby impede the ability of suppliers to effectively respond to fluctuations in demand. (T.R. 199-215.)

Also as part of its affirmative case, OFR presented Dr. Michael J. Ileo, an expert witness who testified as to the nature of competition at the wholesaling and retailing levels of the No. 2 heating oil industry.^{6/} Dr. Ileo submitted evidence which was designed to establish that wholesaling and retailing activities in the No. 2 heating oil industry are conducted in a highly competitive environment. (OFR Exhibits 17-23.) Dr. Ileo testified that competitive forces at the wholesaling and retailing levels of the No. 2 heating oil industry were sufficient to protect consumers against unjustified price increases and excessive profits in these sectors of the industry. (T.R. 315-333.)

Although OFR attempted to demonstrate that further controls were unwarranted with respect to No. 2 heating oil, it did recommend that the DOE take other types of regulatory action. The most significant of these measures was the recommendation that the DOE continue to monitor the No. 2 heating oil industry during the 1978-79 heating season. OFR presented Paul Burke to testify on the courses of action which it recommended be adopted.^{7/} OFR's position was that the current monitoring system be discarded because of its limitations as an analytical device. OFR recommended that the DOE

implement new programs that were more suited to analyzing price behavior in the industry, especially at the refining level. OFR also urged that the DOE expand and coordinate monitoring systems at the state level and take action to augment the capability of state governments to respond to individual hardship situations that might arise as a result of the unregulated pricing and distribution of No. 2 heating oil. In addition, OFR proposed that a series of refiner audits be conducted in order to obtain more detailed and accurate information regarding costs and other components comprising refiners' gross margins. OFR claimed that an audit would reveal information as to refiners' costs which the DOE is incapable of obtaining through other methods. However, OFR argued that from both a legal and economic standpoint, further price and allocation controls would not be a proper measure (T.R. 77-78; Final Brief for OFR at pp. 4-41.)

Following the conclusion of OFR's affirmative case, NOJC presented its direct testimony. NOJC represented the interests of thousands of independent wholesalers and retailers of No. 2 heating oil. Its views appear to be indicative of the views generally held by firms operating at the marketing and distribution levels of the No. 2 heating oil industry.

At the hearing, NOJC maintained that there is no need to reimpose price controls. NOJC also argued that price monitoring should be discontinued at the wholesaling and retailing levels of the industry. In support of its position, NOJC introduced the testimony of several marketers of No. 2 heating oil in various parts of the United States. (T.R. 378-513.) Through this testimony, NOJC also attempted to establish that competition at the wholesaling and retailing levels was vigorous and effectively restrained price increases to the level of increased costs.

In addition, the NOJC witnesses testified that the economic viability of small independent marketers had been enhanced under deregulation. In this regard, the witnesses claimed that subsequent to decontrol supplies of No. 2 heating oil had been adequate to meet demand. In particular, they alleged that the operation of the free market had enabled marketers to better respond to the unexpected increase in demand which they experienced during the past two heating seasons because of extreme weather conditions.

DOJ was the next party to present its case. In its direct presentation, DOJ contended that competitive forces have

been active at all levels of the No. 2 heating oil industry and that there is no need for further regulation of the industry. DOJ further contended that controls were an anti-competitive device which interfered with the normal functioning of the market system and that when adequate supplies existed, economic controls were unnecessary. In addition, DOJ alleged that a continued monitoring program could distort the manner in which firms determined prices for No. 2 heating oil and result in higher prices to consumers.

To support its position, DOJ presented Dr. Peter Simon, a DOJ economist, as an expert witness who testified on competition in the petroleum industry. Dr. Simon's testimony focused primarily on competition at the refining level of the industry. He presented exhibits and testimony setting forth his views on the economic relationships between refiners. (T.R. 514-570, 956-1096; DOJ Exhibits 1-4.) The ultimate factual conclusion advanced by Dr. Simon was that conditions at the refining level demonstrated that a reasonable degree of competition did exist among refiners.

However, DOJ argued that even if a determination were to be made at the hearing that firms in the No. 2 heating oil

industry have been engaging in anti-competitive behavior, the reimposition of price and allocation controls would not constitute a proper remedy. Rather, DOJ claimed that anti-trust enforcement would serve as the only appropriate means of correcting anti-competitive behavior. (T.R. 81-82.)

The final party to present its direct, affirmative case was EPTF. EPTF strongly advocated the reimposition of price and allocation controls. EPTF argued that subsequent to the exemption of No. 2 heating oil from price and allocation controls the price of that product had increased to a level that was unjustifiable when considered against the costs actually incurred by firms in the industry. EPTF maintained that as a result, inequitable burdens had been placed on ultimate consumers of heating oil. EPTF also alleged that No. 2 heating oil prices had increased beyond the level which the FEA had predicted they would reach when decontrol was instituted in 1976. EPTF pointed out that this prediction had been one of the principal reasons underlying the original decision to deregulate heating oil and that the alleged understatement of price increases was therefore a very significant factor to be considered.

The major portion of EPTF's affirmative case centered around its contention that an excessive increase in No. 2 heating oil prices had been caused by increased prices at the refining level of the industry. In support of this contention, EPTF introduced two expert witnesses, George Donkin and Dr. John Wilson, to testify on price behavior and competition at the refining level. Through the exhibits and testimony provided by these witnesses, EPTF sought to establish that, under deregulation, refiners had been charging prices which exceeded the increased costs which they incurred over the same period of time. (T.R. 657-724, 1296-1357; EPTF Exhibits 8-17.) Both Mr. Donkin and Dr. Wilson testified that these excessive price increases could be attributed to anti-competitive behavior by refiners. (T.R. 691-693, 1269-1270.) In this regard, both witnesses produced evidence and testimony relating to certain business practices characteristic of refiners which they alleged were indicative of anti-competitive behavior. (T.R. 693-702, 1270-1276; EPTF Exhibits 14-17.) In addition, Mr. Donkin attempted to further demonstrate the existence of anti-competitive behavior at the refining level through his analysis of the relevant markets for refiners and the concentration of market share by refiners within certain geographic areas. (T.R. 691-712; EPTF Exhibit 14.)

EPTF also offered testimony and evidence concerning the burden imposed on residential users since decontrol as a result of higher No. 2 heating oil prices. (T.R. 636-656, 758-785; EPTF Exhibits 8, 18.) Much of this testimony concentrated on the hardships experienced by low-income households because of their inability to meet the rising costs of No. 2 heating oil. Another part of EPTF's presentation which later became extremely important consisted of statistical analyses based on OFR data which attempted to quantify the total monetary loss incurred by ultimate consumers over the period of decontrol because of excessive increases in the price of No. 2 heating oil. (pp. 60-61 infra.)

EPTF also argued that the programs which the DOE had conducted over the period of decontrol for the purpose of monitoring the price of No. 2 heating oil have failed to provide an effective mechanism to prevent inequitable price increases to ultimate consumers. EPTF therefore recommended that the DOE reinstitute price controls in order to afford consumers adequate protection from excessive price increases in the future.

C. Conduct of the Hearing

The hearing lasted seven days and was adjourned on August 29, 1978. Subsequent to the conclusion of the hearing, each party submitted a final brief to the Office of Hearings and Appeals which included the findings of fact and conclusions of law which the parties requested be adopted by the Office of Hearings and Appeals. In addition, the final briefs set forth recommendations as to the regulatory action, if any, which the party felt the DOE should take with regard to No. 2 heating oil and a detailed description of the manner in which the record of the proceeding supported that position. Each party was given an opportunity to file a written rebuttal to the final briefs submitted by the other parties. The record of the proceeding was closed on October 4, 1978 with the presentation of oral arguments by the parties.

IV. THE BEHAVIOR OF NO. 2 HEATING OIL PRICES SINCE DECONTROL

The behavior of No. 2 heating oil prices subsequent to the date on which the product became exempt from price and allocation controls was one of the central focal points of the evidentiary hearing. This Section consists of two parts. The first part describes the evidence adduced at the hearing as to the pricing behavior of firms involved in the production and marketing of No. 2 heating oil. Particular attention is directed in this part to evidence of the costs experienced by those firms. The second part of this Section presents an analysis of that evidence. In the following Section, pricing behavior is further analyzed in relation to the structure of the industry and the nature of competition within the industry.

A. The Record of Prices and Costs

For the most part, the evidence relating to actual prices and costs for No. 2 heating oil was submitted by two of the parties, OFR and EPTF. This evidence consisted of statistical analyses which OFR and EPTF prepared using price and cost

data that had been collected and made available by the ERA in conjunction with its monitoring programs. The evidence consisted of data which examined (i) overall price movements of No. 2 heating oil at the residential level since decontrol, (ii) the extent to which increases in the residential price were attributable to price increases at the various marketing levels of the No. 2 heating oil industry (the components of the overall increase in residential prices), and (iii) the relationship between prices and costs at each marketing level.

1. The Overall Increase in the Price of No. 2 Heating Oil to Residential Users

Evidence presented by OFR at the outset of the hearing indicated that the national average price of No. 2 heating oil to residential users had risen by 9.3 cents per gallon during the period of decontrol. (T.R. 94.) In other words, prices to residential users increased by approximately 23 percent since July 1, 1976. In comparison, the rate of inflation for the same period as measured by the Consumer Price Index rose only 12.5 percent. (Final Brief for EPTF at p. 45.) The major portion (6.4 cents) of the 9.3 cent

increase took place during the first heating season (1976-77) following the exemption of No. 2 heating oil from controls. The remainder (2.9 cents) of the total price increase occurred during the 1977-78 heating season. (T.R. 94-95; OFR Exhibit 1.) In OFR Exhibit 7, data was presented which traces the monthly average price of No. 2 heating oil to residential users on a national and regional basis during the period of decontrol. That material appears in Table A below.

Table A

Residential Heating Oil Prices
(cents per gallon)

Census Region

<u>Month</u>	<u>United States</u>	<u>New England</u>	<u>Mid-Atlantic</u>	<u>South Atlantic</u>	<u>East North Central</u>
June 76	39.3	40.9	41.1	39.1	37.7
July 76	39.3	40.7	39.8	39.1	37.9
Aug. 76	39.8	41.5	40.3	39.5	38.2
Sept. 76	40.2	41.9	40.8	37.5	38.3
Oct. 76	40.7	42.3	41.4	40.4	39.0
Nov. 76	41.9	43.3	42.4	42.1	40.1
Dec. 76	43.0	44.4	43.6	42.9	41.5
Jan. 77	44.4	45.8	44.9	44.2	43.2
Feb. 77	45.3	46.6	45.8	45.7	43.9
Mar. 77	45.8	47.1	46.3	45.5	44.4
Apr. 77	45.9	47.2	46.5	45.5	44.8
May 77	45.7	47.0	46.4	45.6	44.7
June 77	45.7	47.1	46.4	45.7	44.7
July 77	45.8	47.1	46.4	45.7	44.7
Aug. 77	46.0	47.4	46.6	45.6	44.7
Sept. 77	46.2	47.7	46.7	45.8	45.0
Oct. 77	46.7	48.0	47.3	46.4	45.3

DOE Region*

		<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>
Nov. 77	47.6	48.5	48.1	47.0	46.1
Dec. 77	47.9	48.9	48.6	47.5	46.6
Jan. 78	48.5	49.4	49.2	48.1	47.5
Feb. 78	48.6	49.5	49.3	48.4	47.6
Mar. 78	48.6	49.4	49.3	48.4	47.7
Apr. 78	48.6	49.3	49.2	48.2	47.1

Table A (Continued)

Residential Heating Oil Prices
(cents per gallon)

Census Region

<u>Month</u>	<u>East South Central</u>	<u>West North Central</u>	<u>West South Central</u>	<u>Mountain</u>	<u>Pacific</u>
June 76	37.2	37.3	34.3	40.3	42.8
July 76	36.9	37.3	34.4	40.1	45.0
Aug. 76	37.2	37.7	34.3	39.7	44.7
Sept. 76	38.0	38.8	34.8	41.1	46.0
Oct. 76	38.5	38.7	35.1	42.1	46.0
Nov. 76	39.8	39.5	36.3	42.8	46.5
Dec. 76	41.0	41.9	36.3	42.7	43.8
Jan. 77	43.1	43.0	36.9	43.4	44.6
Feb. 77	43.4	44.0	38.8	44.2	45.2
Mar. 77	43.8	44.6	40.2	44.7	45.9
Apr. 77	43.3	44.2	40.8	44.8	46.4
May 77	43.7	43.7	40.7	44.8	46.5
June 77	44.0	43.3	41.2	45.8	46.8
July 77	44.2	44.2	41.2	44.2	47.9
Aug. 77	43.7	44.5	41.0	44.9	48.2
Sept. 77	44.2	44.9	41.1	44.9	47.2
Oct. 77	43.9	45.4	41.1	45.4	47.4

DOE Region

	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	<u>9</u>
Nov. 77	45.7	NA	44.2	45.4	44.9
Dec. 77	46.1	NA	44.5	45.7	44.5
Jan. 78	46.4	NA	44.5	45.2	44.7
Feb. 78	46.4	NA	45.2	45.5	45.6
Mar. 78	46.5	NA	44.4	45.0	47.0
Apr. 78	46.4	NA	44.6	45.0	45.1

Table A (Continued)

NA = Not Available

* DOE Regions are divided as follows:

Region 1 - Maine, New Hampshire, Vermont, Massachusetts,
Connecticut, and Rhode Island.

Region 2 - New York, New Jersey

Region 3 - Pennsylvania, Maryland, Delaware, West
Virginia, Virginia, and District of Columbia

Region 4 - Kentucky, Tennessee, North Carolina, South
Carolina, Mississippi, Alabama, Georgia,
and Florida

Region 5 - Minnesota, Wisconsin, Michigan, Ohio,
Indiana, and Illinois

Region 6 - New Mexico, Oklahoma, Texas, Arkansas,
and Louisiana

Region 7 - Nebraska, Iowa, Kansas, and Missouri

Region 8 - Montana, North Dakota, South Dakota,
Wyoming, Colorado, and Utah

Region 9 - California, Nevada, and Arizona

Region 10- Washington, Oregon, Idaho, Alaska, and
Hawaii

Source: OFR Exhibit 7.

2. Components of the Increase in Residential No. 2
Heating Oil Prices

OFR also presented evidence regarding the extent to which the increase in residential prices of No. 2 heating oil was attributable to increases in No. 2 heating oil prices at the various marketing levels of the industry. For this purpose, OFR segregated the marketing portion of the No. 2 heating oil industry into three tiers:

- (i) sales by refiners to resellers and retailers (the refining level);
- (ii) sales by resellers to other resellers (the wholesaling level); and
- (iii) sales by resellers to ultimate consumers (the retailing level).^{8/}

Table B illustrates the relative increase in the three components of residential No. 2 heating oil prices over the two most recent heating seasons.

Table B

Estimated Components of Increase in Residential
Heating Oil Prices
 (cents per gallon)

	Increase During First Heating Season Following <u>Decontrol</u>	Increase During Second Heating Season Following <u>Decontrol</u>	<u>Total Increase During Period of Decontrol</u>
Refiner Price to Non- Ultimate Consumers	5.1	0.4	5.5
Wholesale Gross Margin	1.2	1.3	2.5
Retail Gross Margin	0.6	0.6	1.2

Source: OFR Exhibit 2

The data presented in Table B above indicate that No. 2 heating oil prices at the refining level of the home heating oil industry increased 5.5 cents per gallon for the entire decontrol period, 5.1 cents during the 1976-77 heating season and 0.4 cents during the 1977-78 heating season. Increases at the wholesaling level amounted to 1.2 cents per gallon in the first heating season following decontrol and 1.3 cents per gallon in the second heating, or a total increase of 2.5 cents per gallon since July 1976. At the retail level, No. 2 heating oil prices rose 0.6 cents per gallon in each heating season of the decontrol period amounting to an overall increase of 1.2 cents per gallon at this level. As discussed previously, gross margins represent the difference between a firm's selling price and the cost at which it purchases the product. Therefore, a firm's gross margin (or mark-up) measures the degree to which the firm has increased the price of the product in the process of reselling it.

3. The Relationship Between Prices and Costs

Statistical analyses were also prepared and introduced at the hearing to show the relationship between increases in

No. 2 heating oil prices and the increases in costs which occurred at the three marketing levels of the industry.^{9/} These analyses address the question of whether price increases at each level exceeded cost increases, thereby reflecting an increase in profits. This type of analysis underlies one of the most important issues considered at the hearing - whether the price charged to residential consumers for No. 2 heating oil is reasonable in light of the costs of operating in the industry.

(a) The Wholesaling and Retailing Levels

As stated above, OFR evaluated the reasonableness of increases in No. 2 heating oil prices which took place at the wholesaling and retailing levels of the industry during the 1977-78 heating seasons. Pursuant to its 1977-78 monitoring program, OFR collected data on the monthly gross margins of wholesalers and retailers. OFR then compared these gross margins with "benchmark" gross margins, designed to serve as a standard of reasonable mark-up for firms operating at the wholesaling and retailing levels of the industry. At the retailing level, benchmark gross margins were calculated on the basis of the average June 1977 gross margin adjusted to reflect

changes in the consumer price index. A further adjustment was made for seasonal variations. Benchmark gross margins for wholesalers were computed on the basis of the average June 1977 gross margin adjusted by the change in the wholesale price indices. No further adjustments were made in the wholesale gross margin benchmarks. Since gross margins represent the difference between selling prices and product costs, they are comprised of non-product costs and profits. The benchmark methodology assumes that non-product costs and profits at the wholesaling and retailing levels should increase no faster than the wholesale price index and the consumer price index, respectively.10/

Tables C and D present OFR Exhibits 14 and 15 in their entirety. These exhibits compare the benchmark gross margins to actual gross margins during the 1977-78 heating season on a national and regional basis.

Table C

Comparison of Actual Retail Gross Margins to Benchmarks*/
(cents per gallon)

<u>DOE Region</u>	<u>June 1977 Base Period Gross Margin</u>	<u>November 1977</u>			<u>December 1977</u>		
		<u>Margin</u>	<u>B.M.</u>		<u>Margin</u>	<u>B.M.</u>	
1	10.1	10.8	-	11.0	10.8	-	11.3
2	10.4	10.9	-	11.3	11.2	-	11.6
3	9.1	9.1	-	9.9	10.0	-	10.2
4	8.6	9.2	-	9.8	9.4	-	9.9
5	8.1	7.7	-	8.9	8.2	-	9.4
7	7.0	7.2	-	7.7	7.1	-	8.1
10	10.5	11.1	-	10.7	11.1	-	10.8
U.S. Average	9.8	10.2	-	10.5	10.4	-	10.8

Note: Data for regions 6, 8 and 9 were insufficient for statistically valid samples in all months.

Source: OFR Exhibit 14.

*/ The Economic Regulatory Administration, Office of Fuels Regulation, computed the retail benchmarks by inflating the June 1977 base period margin by the Consumer Price Index (less food) and applying a seasonality factor.

Table C (Continued)

Comparison of Actual Retail Gross Margins to Benchmarks*/
(cents per gallon)

DOE Region	<u>January 1978</u>		<u>February 1978</u>		<u>March 1978</u>		<u>Margin Change June to March 1978</u>	
	<u>Margin</u>	<u>B.M.</u>	<u>Margin</u>	<u>B.M.</u>	<u>Margin</u>	<u>B.M.</u>	<u>Actual</u>	<u>Percent</u>
1	11.1	- 12.0	11.5	- 11.7	11.4	- 11.7	1.3	12.9
2	11.3	- 12.3	11.6	- 12.0	11.9	- 12.0	1.5	14.4
3	10.2	- 10.8	10.7	- 10.5	10.9	- 10.5	1.8	19.8
4	9.9	- 10.0	10.3	- 10.6	10.2	- 10.4	1.6	18.6
5	8.3	- 9.3	8.9	- 9.5	8.8	- 9.5	0.7	8.6
7	7.7	- 8.1	8.5	- 7.8	7.5	- 8.0	0.5	7.1
10	11.1	- 10.8	11.3	- 10.9	11.8	- 10.9	1.2	11.4
U.S. Average	10.5	- 11.3	11.0	- 11.1	11.1	- 11.4	1.3	13.3

Note: Data for regions 6, 8 and 9 was insufficient for statistically valid samples in all months.

Source: OFR Exhibit 14.

*/ The Economic Regulatory Administration, Office of Fuels Regulation, computed the retail benchmarks by inflating the June 1977 base period margins by the Consumer Price Index (less food) and applying a seasonality factor.

Table D

Comparison of Actual Wholesale Gross Margins to Benchmarks*/
(cents per gallon)

<u>DOE Region</u>	<u>June 1977 Base Period Gross Margin</u>	<u>November 1977</u>		<u>December 1977</u>	
		<u>Margin</u>	<u>B.M.</u>	<u>Margin</u>	<u>B.M.</u>
1	1.4	1.4	- 1.4	1.5	- 1.4
2	1.7	2.0	- 1.7	1.4	- 1.7
3	1.2	1.5	- 1.2	1.4	- 1.2
4	2.5	2.6	- 2.6	2.0	- 2.6
5	2.0	1.7	- 2.0	1.4	- 2.1
U.S. Average	1.4	1.3	- 1.4	1.2	- 1.4

Note: Data for regions 6, 7, 8, 9 and 10 were insufficient for statistically valid samples in all months.

Source: OFR Exhibit 15

*/ The Economic Regulatory Administration, Office of Fuels Regulation, computed the wholesale benchmarks by inflating the June 1977 base period margin by the Wholesale Price Index for industrial commodities.

Table D (Continued)

Comparison of Actual Wholesale Gross Margins to Benchmarks*/
(cents per gallon)

DOE Region	<u>January 1978</u>		<u>February 1978</u>		<u>March 1978</u>		<u>Margin Change June to March 1978</u>	
	<u>Margin</u>	<u>B.M.</u>	<u>Margin</u>	<u>B.M.</u>	<u>Margin</u>	<u>B.M.</u>	<u>Actual</u>	<u>Percent</u>
1	1.5	- 1.4	1.8	- 1.5	1.3	- 1.5	(0.1)	(7.1)
2	1.8	- 1.8	1.7	- 1.8	1.5	- 1.8	(0.2)	(11.8)
3	1.4	- 1.2	1.4	- 1.2	1.5	- 1.3	0.3	25.0
4	1.1	- 2.6	1.5	- 2.6	1.9	- 2.6	(0.6)	(24.0)
5	1.5	- 2.1	1.2	- 2.1	1.3	- 2.1	(0.7)	(35.0)
U.S. Average	1.5	- 1.4	1.6	- 1.5	1.2	- 1.5	(0.2)	(14.3)

Note: Data for regions 6, 7, 8, 9 and 10 were insufficient for statistically valid samples in all months.

Source: OFR Exhibit 15

*/ The Economic Regulatory Administration, Office of Fuels Regulation, computed the wholesale benchmarks by inflating the June 1977 base period margin by the Wholesale Price Index for industrial commodities.

The data in Table C indicate that retail benchmark gross margins were not exceeded by actual gross margins during the 1977-78 heating season on a national basis. However, actual gross margins exceeded benchmark gross margins at the retail level in several regions during the same period. The data in Table D show that actual gross margins exceeded wholesale benchmark gross margins on a national average basis in January and February of 1978. Gross margin data of a similar nature for the 1976-77 heating season was not presented at the hearing because the benchmark methodology had not yet been developed for that heating season.

b. The Refining Level

At the hearing, OFR also introduced its analysis of prices at the refining level based on data collected as part of its 1977-78 monitoring program. This analysis compared the actual prices which refiners had charged in sales of No. 2 heating oil to non-ultimate consumers with index prices established by OFR for the period July 1977 through March 1978. Theoretically, each monthly index price constituted an estimate of the average ceiling price which refiners would have been permitted to charge for No. 2 heating oil in that

month assuming price controls on the product had remained in effect. Under the general regulatory provisions, refiners are permitted to increase their selling price of controlled products to reflect increases in the product and non-product costs. The index price for a particular month was calculated by adding to the base price (i.e., the actual price charged by refiners in sales of No. 2 heating oil to non-ultimate consumers in June 1977) the increased costs incurred by refiners since the base period.11/ In essence, index prices represent the prices refiners would have charged to reflect all of their increased costs on a dollar-for-dollar basis. Therefore, the index price methodology provides a mechanism through which increased prices at the refiner level can be compared to actual cost increases incurred by refiners. Table E compares index prices to actual prices during the period July 1977 through March 1978.

Table E

Refiner Index and Actual U.S. Average Prices to
Non-Ultimate Consumers
(cents per gallon)

<u>Month</u>	<u>Index Price</u>	<u>Actual Price</u>	<u>Difference*</u>
1977			
June	--	35.6	--
July	36.1	35.8	0.3
August	36.1	35.6	0.5
September	36.3	35.5	0.8
October	36.5	36.0	0.5
November	36.5	36.3	0.2
December	36.5	36.6	(0.1)
1978			
January	36.8	36.8	0.0
February	36.2	36.4	(0.2)
March	36.1	36.2	(0.1)

* Negative number indicates index was exceeded.

Source: OFR Exhibit 13

The data presented in Table E indicate generally that refiners' actual monthly prices during the period July 1977 through March 1978 remained below the corresponding index price. However, slight excesses in prices did occur in three months of that period. It should be noted, however, that the index prices were calculated on the basis of June 1977 actual prices and therefore do not take into account any excessive price increases which might have occurred during the previous heating season.

Utilizing the same methodology of index prices, EPTF performed a comparison of refiner index prices with actual prices for the entire period of decontrol. (EPTF Exhibit 3; OFR Exhibit 16.) Basically, this analysis used prices for No. 2 heating oil in May 1976 as the base price for measuring cost and price increases. The index price was then calculated by adding the increased costs incurred by refiners since May 1976 to the actual price charged in that month. From this analysis, EPTF derived a figure which it maintained was representative of the total revenues that refiners had received since decontrol in excess of the revenues which they would have received if price controls had remained in effect. This amount, which EPTF called "overcharges,"

totaled \$299 million from the date No. 2 heating oil was exempted from controls through March 1978. (T.R. 291.) However, OFR's testimony indicated that, as of the beginning of the decontrol period, refiners had accumulated a "bank" of "undercharges" (i.e., revenues representing the aggregate difference between actual prices and maximum lawful selling prices when those actual prices were less than maximum allowable prices) of \$106 million. (T.R. 823.) Since refiners would have been permitted to carry forward these undercharges and recoup them by charging higher prices in a later period if controls had remained in effect, the net amount of the "overcharges" was actually \$193 million during the period of decontrol (\$299 million minus \$106 million). (Final Brief for EPTF at p. 49.)

Additional evidence was elicited at the hearing regarding the projected behavior of prices and costs at the refiner level during the impending 1978-79 heating season. In this regard, OFR and EPTF each prepared forecasts of refiners' selling prices and costs for No. 2 heating oil for the 1978-79 heating season. The purpose of the projections was to respond to inquiries from the hearing panel as to whether increases in refiners' prices over the next heating season

would exceed the level of price increases which firms would have been permitted to implement under controls to reflect increased costs and if so, the extent of the resulting "overcharge". OFR and EPTF arrived at significantly different conclusions as a result of the differing assumptions used in formulating the projections.

In its forecasting model, OFR used the following major assumptions with regard to the increased costs that refiners could expect to experience during the 1978-79 heating season:

- (1) The cost of domestically produced crude oil to refiners would rise in accordance with the levels set forth in the provisions of the EPCA.12/
- (2) Imported crude oil costs would rise by approximately 6 percent in the month of January 1979.
- (3) Total non-product costs for refiners would increase at an annual rate of 0.8 cents per gallon.
- (4) The volume of No. 2 heating oil purchased by refiners for resale would remain constant at a level equal to March 1978.

- (5) The cost of purchased product would increase proportionately with increases in the cost of imported crude oil. (T.R. 804-805; 807-809.)

In addition, the OFR model predicted the amount of crude oil that refiners would import on the basis of assumptions regarding the projected domestic supplies and total demand for crude oil. (T.R. 806-807.)

The OFR model also assumed that the prices refiners would charge in sales of No. 2 heating oil to non-ultimate consumers would increase over the next heating season at a rate equal to the rate of increase anticipated for the Consumer Price Index. OFR's projection of the rate at which the Consumer Price Index would increase was based on a comprehensive macroeconomic model of the general economic conditions expected to prevail in the future. (T.R. 810-813.)

Based on these assumptions, OFR's model indicated that over the 1978-79 heating season, projected prices at the refiner level would increase at a lower rate than the corresponding projections of cost increases. OFR computed a resultant "undercharge" attributable to refiners' sales of No. 2 heating

oil to non-ultimate consumers of \$24 million over the next heating season (April 1978 through April 1979). OFR's analysis also indicated that if the period of decontrol were extended to include the 1978-79 projections, refiners would have received total revenues of \$169 million in overcharges (prices charged in excess of those which would have been allowable under controls). (OFR Exhibits 24-26.) Table F indicates OFR's projections of prices and corresponding overcharges for the 1978-79 heating season.

Table F

OFR Projections of Refiner Prices and Overcharges During the
1978-79 Heating Season

<u>Month</u>	<u>Projected Selling Price (cents per gallon)</u>	<u>Cumulative Overcharges Since July 1976 (millions of dollars)</u>
April 1978	36.2	193
May 1978	36.0	188
June 1978	36.0	183
July 1978	36.0	187
August 1978	36.3	194
September 1978	36.3	188
October 1978	36.5	178
November 1978	37.3	176
December 1978	37.6	181
January 1979	38.1	161
February 1979	38.7	221
March 1979	38.8	204
April 1979	38.6	169

Source: OFR Exhibits 24-26

EPTF also submitted its projections as to refiners' prices of No. 2 heating oil in the future. Since it incorporated the portion of the OFR forecasting model which projects refiners' costs, both the EPTF and OFR projections were based on identical assumptions with regard to the costs which refiners would incur over the 1978-79 heating season. (T.R. 1124-1125.) However, EPTF based its projections of refiner prices through the 1978-79 heating season on the actual trend of refiners' wholesale prices of No. 2 heating oil since decontrol. Those prices were entered on a monthly basis into a linear regression analysis to formulate a trend line projection of the behavior of prices over the next 12 months. The trend line analysis interpolates a constant rate of increase which best characterizes price increases over the previous two heating seasons and uses that rate to project price behavior in the future. (T.R. 1116-1118.)

On the basis of these trended price projections and the OFR estimate of projected refiner costs, EPTF concluded that over the next heating season (April 1978 through April 1979), refiners would realize revenues of approximately \$499 million as a result of increasing their prices beyond the level of the increased costs which they experienced.

When combined the projected overcharges with the overcharges existing through April 1978 to arrive at an estimate

of total refiner overcharges during the first three years of decontrol. EPTF's estimate was \$692 million in overcharges as of April 1979. EPTF's projections of refiner prices and overcharges are shown in Table G.

Table G

EPTF Projections of Refiner Prices and Overcharges During the
1978-79 Heating Season

<u>Month</u>	<u>Projected Selling Price (cents per gallon)</u>	<u>Cumulative Overcharges Since July 1976* (millions of dollars)</u>
April 1978	36.0	193
May 1978	37.78	217
June 1978	38.05	243
July 1978	38.17	281
August 1978	38.43	317
September 1978	38.43	348
October 1978	39.48	383
November 1978	39.99	425
December 1978	40.82	491
January 1979	41.18	542
February 1979	41.49	630
March 1979	41.52	686
April 1979	40.74	692

* EPTF contended that the cumulative overcharges shown above for each month were actually \$15 million greater during the entire period because refiners importing No. 2 heating oil had received an additional \$15 million in entitlements benefit during February and March of 1976. EPTF maintained that these entitlements benefits should be looked upon as a decrease of \$15 million in refiners' costs and thereby increase cumulative refiner "overcharges" in months subsequent to that time by \$15 million. However, it is our understanding that the cumulative overcharge figures in this Table are net of any costs or benefits from the entitlements program. Therefore, it is not appropriate to adjust these figures.

Source: EPTF Exhibits 23 and 24 (T.R. 1121-1129)

EPTF also introduced an alternative method for projecting refiners overcharges for the 1978-79 heating season. This method utilized the same trend line analysis that was used in the approach described above. However, the trend line was based on actual refiner overcharges during the period July 1976 through April 1978. The constant rate of increase in monthly overcharge figures during the previous two heating seasons was then used to project the future trend of refiner overcharges. The results of this analysis are shown in Table H below.

Table H

EPTF's Projections of Refiner Overcharges during the 1978-79
 Heating Season on the Basis of Trend Line Analysis
of Overcharges During the Period of Decontrol

<u>Month</u>	<u>Cumulative Overcharges Since July 1976 (millions of dollars)</u>
April 1978	192
May 1978	171
June 1978	185
July 1978	200
August 1978	214
September 1978	209
October 1978	243
November 1978	258
December 1978	273
January 1978	278
February 1978	302
March 1979	316
April 1979	331

Source: EPTF Exhibit 21

The projections in Table H indicate that refiners' overcharges for the period April 1978 through April 1979 will equal \$138 million. If this figure is added to the overcharges which already existed, according to EPTF, as of April 1978, cumulative refiner overcharges between July 1976 and April 1979 would amount to \$331 million.

B. Findings with Respect to Price Behavior of No. 2 Heating Oil

The evidence discussed in the previous section can be segregated into two general categories for purposes of our evaluation of No. 2 heating oil prices. The first category consists of evidence regarding the actual behavior of prices and costs in the home heating oil industry since the exemption of No. 2 heating oil from price and allocation controls. This evidence was obtained by the parties at the hearing from data made available by the ERA. ERA derived this data through statistical surveys of the home heating oil industry which it conducted as part of its monitoring efforts. The statistical surveys consisted of forms filed with the DOE by firms involved in the production and marketing of home heating oil over the course of the decontrol period. For

the most part, the validity of this evidence regarding prices and costs was not challenged by any party at the evidentiary hearing. In fact, several parties utilized this evidence as a factual basis for statistical analyses which they introduced at the hearing. As a general matter, we found this type of evidence to be reliable and therefore, we accept those factual representations as correct.^{13/} That material will be alluded to throughout this portion of the Decision.

The second category of evidence consists of representations which were factual in nature but were not based on statistical surveys. These positions were formulated by several parties on the basis of their analyses of data in the first category - i.e., actual price and cost data - for the period July 1976 through April 1978. In doing so, various analytical methods were used to simulate price and cost behavior during the impending heating season. In particular, OFR and EPTF presented statistical analyses that project price and cost behavior during the impending heating season. In addition, OFR used general economic indicators to estimate marketer's non-product costs when actual statistics were unavailable. As might be expected, the validity of this type of evidence

was subject to considerable discussion and dispute at the hearing. Evidence of this type invariably involves significant assumptions in order to relate the simulation to the actual occurrence. In some cases, parties at the hearing not only questioned the assumption incorporated in the methodology used by other parties for simulating price and cost behavior, but also presented alternative approaches. The focus of this portion of the Decision will be on an evaluation of this body of evidence and a determination of the findings and ultimate conclusions that can be drawn from it.

1. The Wholesaling and Retailing Levels

During the period of decontrol (July 1, 1976 to April 1, 1978), No. 2 heating oil prices increased 2.5 cents per gallon at the wholesale level and 1.2 cents per gallon at the retail level. (Table B at p. 53 supra.) However, the evidence submitted at the hearing was insufficient to permit us to make a determination of the amount of increased costs incurred by firms at those levels during that period. Although it was evident that the gross margins (which consist of non-product costs and profits) of retailers and wholesalers

did increase during the period of decontrol, actual evidence was lacking as to the portion of the increase which was attributable to non-product cost increases. Accordingly, the statistical data itself does not indicate the relationship between increases in gross margin and increased non-product costs. It therefore does not reveal whether and to what extent increases in gross margins represented increases in profits.

Although data on non-product cost increases does not exist with respect to the wholesaling and retailing levels of the home heating oil industry, OFR did submit an analysis in which it utilized the benchmarks referred to above to estimate increases in non-product costs. That analysis was based on the assumption that these costs have risen at a rate equal to the rate of increase in general economic indicators (the Consumer Price Index and the Wholesale Price Index). However, we have no reason to believe that this methodology accurately depicts non-product costs in the retail or wholesale sectors of home heating oil industry. Moreover, OFR failed to provide any affirmative empirical evidence which would justify its use of the Consumer Price Index and the Wholesale Price Index for this purpose. As a result, the evidence

presented at the hearing is not sufficient to permit us to make meaningful findings as to whether price increases at the wholesaling and retailing levels subsequent to decontrol reasonably reflect increased costs.

2. The Refining Level

The evidence which was introduced at the hearing with respect to prices and costs at the refining level was more substantial. To a large extent, it demonstrated that there was a consistent disparity between price increases and actual cost increases at the refining level of the industry. Evidence based on statistical surveys which the DOE conducted established that between July 1976 and April 1978, refiners had increased the price of No. 2 heating oil in sales to non-ultimate consumers (wholesalers and retailers) by a total of 5.5 cents per gallon. (Table B at 53 supra). Refiners' costs during the same period were shown to have risen by only 4.2 cents per gallon. (T.R. 98.) The difference between the two figures is 1.3 cents or 23 percent of the total price increase. Consequently, the evidence indicates that during the decontrol period a significant portion of the price increases which refiners charged for No. 2 heating oil were implemented not

to keep pace with cost increases which they were incurring but for other reasons.

In its presentation, EPTF attempted to take this data one step further and calculate the "excess" revenues or "overcharges" which refiners received during the decontrol period. EPTF first constructed a model of what prices would have been during the period of decontrol if controls had remained in effect. In essence, this price schedule showed refiner prices for No. 2 heating oil increasing at the same rate as cost increases. EPTF then determined the difference between the aggregate revenues which refiners would have obtained if those prices had been in effect and the revenues which refiners actually received during the period of decontrol (July 1976 through April 1978). (EPTF Exhibit 3; OFR Exhibit 16; T.R. 159-171.) EPTF's simulation of refiner prices utilized the refiner index methodology developed by OFR as part of its 1977-78 program to monitor home heating oil prices. The refiner index essentially represented prices that refiners would charge to reflect all of their increased costs on a dollar-for-dollar basis. According to the EPTF analysis, the excess revenues or "overcharges" which refiners realized during the period of decontrol were substantial.

Its model showed that refiners have already received approximately \$193 million since the exemption of No. 2 heating oil from controls as a result of charging prices in excess of costs. (p. 64-65 supra.)

Although the \$193 million overcharge figure was accepted by all the parties at the hearing, OFR pointed out some limitations in the methodology used by EPTF to derive this figure.^{14/} In addition, the \$193 million in refiner overcharges should be viewed in the light of extenuating market conditions which could possibly have contributed to a portion of the overcharges.^{15/} Nevertheless, a substantial showing was not made that the limitations in the methodology used or the possibility that extenuating market conditions might have existed seriously affect the validity of the \$193 million figure. We therefore find on the basis of the evidence taken as a whole that the \$193 million figure represents a reasonable approximation of refiner overcharges for No. 2 heating oil for the first two years after decontrol.

3. Projected Prices and Costs at the Refiner Level

The evidence presented also leads us to find that refiner prices during the 1978-79 heating season will continue to rise at a rate that exceeds the cost increases refiners are incurring. As a result, during the impending heating season refiners will have charged more for No. 2 heating oil than they would be able to charge if controls were in effect. The evidence presented at the hearing further indicates that over the entire period of decontrol through the end of the current heating season, refiners will realize nearly \$331 million more from selling No. 2 heating oil than they would have been able to obtain if controls remained in effect.

Three exhibits were introduced at the hearing which presented forecasts of the extent to which prices at the refiner level would exceed costs during the 1978-79 heating season. (EPTF Exhibits 21, 24; OFR Exhibits 24-26.) The exhibits differed significantly in the assumptions that were used to project future prices and overcharges, and conclusions reached by the parties with regard to overcharges differed in corresponding fashion.

In Exhibit 24, EPTF projected that during the 1978-79 heating season, refiners will receive approximately \$499 million more than they would have been permitted to obtain for No. 2 heating oil under controls. This projection would mean cumulative excess revenues of \$692 million for No. 2 heating oil from the beginning of the decontrol period to the end of the impending heating season. We believe that this position overstates the case somewhat. In preparing Exhibit 24, EPTF assumed that refiner prices for No. 2 heating oil will rise at a rate which is equal to the average rate of increase over the two prior heating seasons. This methodology, however, fails to take into account a significant decline in the rate of price increases which occurred in the past two heating seasons. As Table B of this Decision indicates, (p. 53 supra), the major increases in prices at the refiner level (5.1 cents per gallon) took place during the first heating season subsequent to the exemption of No. 2 heating oil from controls. Refiners' prices during the following heating season (1977-78) increased by a much lesser amount (0.4 cents per gallon). This evidence would appear to indicate a trend of stabilizing prices and declining price increases at the refining level and appropriate weight should therefore be given to the stabilization of prices during the 1977-78 heating season.

In contrast, OFR's projection of refiners prices for No. 2 heating oil during the 1978-79 heating season understate the prices and the resulting refiner overcharges for the next heating season. For the purposes of its analysis, OFR determined that refiners' prices are likely to increase in proportion to increases in the Consumer Price Index. (p. 67 supra.) If this assumption were accepted, we would be led to the conclusion that refiners' prices will actually rise at a lower rate during the 1978-79 heating season than the cost increases refiners will incur over that same period. We find no basis for accepting the proposition that prices at the refining level will not keep pace with cost increases, and have accordingly rejected the OFR projections.

We believe that the most accurate depiction of refiner overcharges for the 1978-79 heating season is contained in EPTF's alternative projection of overcharges at the refiner level. (Table H at p. 74 supra.) Unlike the analyses described above, the methodology used in formulating this forecast does not project overcharges on the basis of refiners' prices and costs. Instead, it projects refiner overcharges for the impending heating season on the basis of the actual trend of refiner overcharges since No. 2 heating oil was

exempted from controls. (p. 73 supra.) This method is more credible than either of the other approaches. It relies on undisputed evidence in the record that a relatively consistent pattern of overcharges has occurred subsequent to decontrol.16/. The EPTF methodology also assumes that the rate of change in refiner overcharges during the past two heating seasons will remain constant during the current period. There is substantial support in the record for this assumption since refiner overcharges did, in fact, increase at similar rates in each of the two previous heating seasons. Refiner overcharges during the first heating season subsequent to the exemption of No. 2 heating oil from controls amounted to approximately \$127 million. (However, the actual amount of refiner overcharges for the 1976-77 heating season would have amounted to \$21 million since refiners had accumulated \$106 million in "banks" as of the date on which No. 2 heating oil was exempted from controls. (p. 65 supra.) In the second heating season of decontrol, those overcharges increased by an additional \$172 million. Using this model, EPTF's projects that the aggregate amount of refiners' overcharges during the current heating season alone will be approximately \$138 million (April 1978 through April 1979). Since the evidence taken as a whole supports the use of that model, we adopt

the findings which the model yields. Accordingly, we find that refiner overcharges for No. 2 heating oil for the period beginning in July 1976 and extending through April 1979 will total approximately \$331 million.17/

4. Conclusions

With respect to the wholesale and retail levels of the industry, the evidence presented at the hearing was not sufficient to permit a determination to be made as to whether price increases in the past reasonably reflected increased costs incurred by wholesalers and retailers. In the absence of more substantial evidence, we cannot make a determination as to whether equitable prices have been charged for No. 2 heating oil subsequent to decontrol at the wholesaling and retailing levels of the industry. However, as the next Section of this Decision will discuss, competitive forces at the wholesaling and retailing levels may well be adequate to constrain excessive price increases in those sectors of the industry and lead to "equitable" price levels.

In contrast, the evidence at the refiner level does permit us to draw a number of conclusions as to whether equitable

prices have been charged during the decontrol period. On the basis of the findings discussed above, it would appear that refiners have raised their prices of No. 2 heating oil in sales to non-ultimate consumers to levels significantly in excess of costs. It is also possible to conclude that the higher prices which refiners have charged have enabled them to receive greater revenues than they would have if controls had remained in effect. Although it is difficult to quantify precisely the amount of the revenues which refiners have already received by charging excessive prices ("overcharges"), the weight of the evidence leads us to accept EPTF's estimate of \$193 million in overcharges during the period July 1976 to April 1978. In addition, although the evidence regarding projected prices, costs, and overcharges at the refining level during the current heating season is not conclusive, it is most unlikely that prices at this level will decline to a level below increased costs. In fact, based on the record of the past two years (or even the 1977-78 heating season alone) it is likely that the prices refiners charge for No. 2 heating oil will continue to rise at a rate that will exceed the cost increases refiners will incur. On the basis of the evidence taken as a whole, we find that the best estimate of the likely amount of refiner

overcharges for the entire period of decontrol through the end of the current heating season will be \$331 million.

The usefulness of a type of analysis which focuses on "overcharges" is, however, limited by the fact that price increases above the level of increased costs do not necessarily connote unreasonable or inequitable prices. To perform a comprehensive evaluation of the reasonableness of prices, the fairness of a firm's rate of return on invested capital (as represented by its level of profits) must also be taken into consideration. However, the absence of any evidence in the record relating to the rates of return realized by firms in the No. 2 heating oil industry prevents us from making findings of that nature.

Nevertheless, the magnitude of refiner overcharges during the period of decontrol and the likelihood of continued overcharges during the 1978-79 heating season raise serious questions as to the adequacy of competitive forces at the refiner level as a means of restraining inequitable prices. Section V of the Decision examines that issue in detail.

C. The Impact of No. 2 Heating Oil Prices on Consumers

During the course of the evidentiary hearing, we also heard evidence submitted by EPTF concerning the impact of rising No. 2 heating oil prices on residential users generally and low-income consumers in particular. EPTF contended that the problems which many consumers, particularly low-income users, have experienced as a result of higher No. 2 heating oil prices should be an important consideration in this proceeding and should lead to the reimposition of price controls. To support its position, EPTF presented two expert witnesses, Eunice S. Grier and Anthony J. Maggiore. Both witnesses have been extensively involved in programs to evaluate the impact of rising fuel oil prices on the poor. (T.R 636-639, 726). The testimony which they submitted centered specifically on the special hardships and difficulties experienced by low-income users in coping with rising fuel oil costs.

Ms. Grier submitted a study prepared by her consulting firm which analyzed and compared the effects of No. 2 heating oil prices on low-income users during the 1974-75 and 1977-78 heating seasons. (EPTF Exhibit 8.) During the 1974-75

heating season, prices of No. 2 heating oil had been subject to the Mandatory Petroleum Price and Allocation Regulations. The evidence Ms. Grier introduced indicated that the average annual expenditure for fuel oil by low-income households rose 41 percent since 1975 to an average annual expenditure of \$530 in 1977-78. (T.R. 641.) Ms. Grier also stated that the study which was drawn from a nationwide survey of household energy use further indicated that the major portion of the increase in costs was attributable to higher fuel oil prices as opposed to colder weather conditions and a concomitant increase in consumption. (T.R. 643.) According to Ms. Grier's testimony, many low-income households have been unable to obtain favorable credit terms or budget plans from marketers, and as a result, the difficulties these users experience in meeting their fuel oil payments have been aggravated. (T.R. 647-648.)

Mr. Maggiore's testimony and the documentary evidence he introduced analyzed the effect of higher fuel oil prices on low-income users in a specific urban environment - Milwaukee, Wisconsin. (T.R. 729.) Mr. Maggiore testified that fuel oil costs to low-income households in Milwaukee averaged between \$105 and \$110 per month during the 1977-78 heating

season and was equal to approximately 32 percent of the total monthly income of persons with incomes at or below the poverty level. (T.R. 729-730; EPTF Exhibit 18.)

Although this evidence provides valuable insights as to the special difficulties which low-income groups have experienced in meeting the higher costs of heating oil, we do not believe that the evidence alone warrants the reimposition of price controls. In fact, there is no evidence in the record that the imposition of price controls would rectify a basic situation in which fuel costs are consuming a very large proportion of the total financial resources of low-income persons. Moreover, the prices of practically all consumer goods including basic necessities have been rising during the relevant time periods, and the evidence shows that other forms of energy for residential heating have been increasing in price at comparable rates. (T.R. 327-328; OFR Exhibit 23.) The EPTF submissions do not directly address the issue of whether the price increases for fuel oil which low-income users in particular have experienced were reasonable in comparison to other such price increases. It therefore appears from the evidence that the particular burden created by the cost of heating oil to low-income groups as a discrete

group are not so much the result of escalating No. 2 heating oil prices as they are indicative of the general economic condition of low-income groups.

Nonetheless, the very high percentage of the income which low-income families must devote to meeting escalating fuel oil prices is certainly a factor which should be taken into account in the process of determining whether the reimposition of price controls are necessary to establish equitable prices for the product. In addition, the evidence submitted does provide a basis for concluding that the DOE should develop a comprehensive program designed to assist low-income consumers in obtaining adequate supplies of No. 2 heating oil at reasonable price levels. Since the problems of low-income users will vary with the locality in which they reside, this program would be most effective if it were administered at the state or local levels. We therefore accept OFR's recommendation that the DOE act in conjunction with state and local governmental agencies to augment their capabilities to respond to local supply distortions and the special needs of low-income consumers. (Final Brief for OFR at pp. 50-51.)

V. COMPETITION IN THE NO. 2 HEATING OIL INDUSTRY

As stated above, the evidence submitted in this proceeding indicates that prices of No. 2 heating oil during the two heating seasons subsequent to decontrol increased at a greater rate than the costs incurred in refining and distributing the product. (p. 88 supra.) Undoubtedly, this situation permitted the firms in the industry to earn higher profits than if prices rose at a rate that was limited to the rate of cost increases. The price evidence analyzed earlier in this Decision also indicates that the price of No. 2 heating oil to consumers would have been lower in both the past two heating seasons and in the impending heating season if heating oil were still subject to price and allocation controls. (p. 86 supra.) The evidence also indicates that the increased cost of heating fuel is a significant economic burden for lower income Americans. (pp. 87-91 supra.)

However, these findings standing by themselves do not in our view provide sufficient support for adopting the position of EPTF that heating oil should again be placed under price and allocation controls. Another factor requires very

Careful scrutiny - the effectiveness of competition as an alternative method of achieving national energy policy objectives without the imposition of controls. In enacting the Emergency Petroleum Allocation Act of 1973, ("EPAA") the Congress emphasized the importance of competition to achieving the objectives outlined in Section 4(b)(1) of the Act. The report of the Conference Committee stated that:

The committee recognizes that mandatory allocation programs which compel the distribution and sale of fuels for particular uses at specified prices necessarily distort the economy and interfere with a free market mechanism. It is the intent of this legislation that economic distortion and interference be minimized to the extent practicable. The President should assure himself that his actions interrupt existing supply mechanisms only when necessary to permit the accomplishment of the objectives stated in subsection (4). 18/

Fostering competition and enhancing economic flexibility are also explicit goals of Subsections (I) and (D) of Section 4(b)(1) of the EPAA. Furthermore, competition is often the best means to foster other goals embodied in that Section,

such as protecting public health, maintaining all public services and attaining economic efficiency. The enhancement or restoration of competition is also an underlying objective of the reporting requirements of Section 4(c)(2)(A), the monitoring provision of Section 7, the reevaluation provision of Section 11, the deregulation mechanism of Section 12 and the provisions terminating regulatory authority in Section 18.

In view of the importance which the EPAA places on competition, it can be persuasively argued that when ample supplies of a product exist, equitable prices are the very prices that would be established in a strong and healthy competitive marketplace. In many ways this theory was the underlying premise of the Findings and Views which led to the FEA to recommend to Congress in 1976 that price and allocation controls be removed from all middle distillates, including No. 2 heating oil.

On the other hand, if the preponderance of the evidence indicates that workable competition does not exist at one or more levels of the No. 2 heating oil industry, then it might be reasonable to conclude that the reimposition of controls

is necessary to achieve the objectives set forth in the EPAA. No. 2 heating oil is an essential commodity to many households and the financial resources of a significant number of American families are seriously strained by the price increases they must pay for this product. Moreover, many households have no alternative other than to continue paying higher prices for No. 2 heating oil because of the difficulty of converting to a natural gas, electric or another heating system. 19/ Accordingly, if the price of this essential commodity increased substantially more than increased costs since decontrol and if that price has not been constrained by workable competition, then it would be our view that the prices being charged for No. 2 heating oil are inequitable.

In addition, if workable competition does not exist in the No. 2 heating oil industry, then the prevailing price for that product would not produce the economic efficiency expected from workable competition and many of the other objectives specified in Section 4(b)(1) would also be frustrated unless controls were reimposed. For example, the ability of residential customers, especially the poor, to maintain adequate residential heating would be adversely

affected (Subsection (b)(1)(A)), the industry would not be operating in an "economically sound" fashion (Subsection (b)(1)(D)), economically disadvantaged "areas" would not be able to obtain the same "equitable" fraction of national supplies as would have been available if prices were influenced by workable competition (Subsection (b)(1)(F)) and "economic distortion" in the market for No. 2 heating oil would not be as effectively minimized as it would be under controls (Subsection (b)(1)(I)). In addition, reimposition of controls under the circumstances described above would be consistent with all the other objectives in Section 4 because controls could be designed to accomplish those objectives at least as well as the non-competitive market conditions which prevailed.

Consequently, if the preponderance of the evidence in this proceeding indicates that workable competition does not exist among firms at one or more levels of the heating oil industry, we would conclude that the reimposition of controls "is necessary to attain, and is consistent with, the objectives specified in Section 4(b)(1)." As Section 12(f) indicates, that is the very standard which must be satisfied for the President to exercise standby authority to specify the price or allocate supplies of any previously decontrolled product.

The remainder of this portion of the decision will discuss whether the evidence submitted in this proceeding indicates that workable competition exists at the refining, wholesale, retail and distribution levels of the home heating oil industry.

A. Competition at the Wholesale and Retail Levels of the Home Heating Oil Industry

In its presentation, the OFR submitted substantial evidence that there has been workable competition at the wholesale and retail levels of the home heating oil industry. That evidence, which was not rebutted by any other party, consisted primarily of testimony by Dr. Michael J. Ileo. Dr. Ileo is a regulatory economist with substantial knowledge of the petroleum industry. (T.R. 311-16.) According to Dr. Ileo's testimony, there is a high degree of competition at the wholesaling and retailing levels of the industry. (T.R. 316.)

Dr. Ileo testified that:

Not only does there appear to be vigorous intra-industry competition, but it also seems that wholesalers and retailers of home heating oil face intense competition from electric and gas utilities.

* * *

[A] very large number of small and independent firms participate in the wholesaling and retailing of home heating oil. Moreover, there does not appear to be any significant level of concentration or dominance in the industry by one or several firms either nationally or in localized markets.

* * *

[T]he data show that:

(1) Firms involved in the wholesaling and retailing of home heating oil have earned rates of return on assets and equity which have been typically less than those earned in other business sectors, including other comparable wholesaling and retailing establishments;

(2) Wholesalers and retailers of home heating oil have been losing their share of the home heating market to competitors, particularly electric utilities, [and]...market shares generally have been changing; and

(3) Electric and gas utilities employ pricing and other practices which serve to encourage the use of electricity and gas for home heating purposes. . . .

* * *

[P]rofessor Markham found that in 1977, over 2,100 independent retailers of fuel oil operated in New England. A Dunn & Bradstreet listing is cited as showing some 16,000 firms involved in the fuel oil business nationally. The National Oil Jobbers Council estimates that there are 7,200 to 8,000 independent marketers of home heating oil.

* * *

With regard to the size of the typical fuel oil marketer, Professor Cooley found in a sample study that the average firm in 1976 had 12 full-time employees, three part-time employees, assets of \$480,000 and revenues of \$1.9 million. (T.R. 316-319.)

Dr. Ileo also submitted several exhibits that indicate that active, effective competition exists in the wholesale and retail sectors of the heating oil industry. OFR Exhibit 17 indicated that firms operating in these sectors of the heating oil industry are generally modest in size, with average assets for retail firms at the \$1.6 million level and wholesale firms at the \$2.8 million asset level. The data had been compiled for wholesale firms in 1976. OFR Exhibit 18 indicated that the pre-income tax rate of return on assets for wholesalers and retailers of No. 2 heating oil has diminished since decontrol, with the 1976 rate of return for retailing being 3.3% and the rate for wholesaling being 5.2%. In contrast, the 1970-1976 average rates of return for a heating oil retailer was 6.0%. The 1970-1976 average rate for heating oil wholesalers was 6.6%. Exhibit 19 presented information regarding the pre-income tax rate of return on equity (a different but related basis for

calculating rates of return). This material showed that the rates of return for retailing and wholesaling of home heating oil in 1976 were substantially lower than the 1970-1976 average rate of return for those sectors of the heating oil industry and were lower than the rate of return for several industrial sectors, including all FTC-Manufacturing companies, Standard & Poors 400 industrials, Moody's 24 utilities, 46 retailing companies and 59 wholesaling companies.

We find that these exhibits provide substantial evidence that the rates of return at the retailing and wholesaling levels of the heating oil industry have been constrained by competition and are consistent with rates of return of other wholesalers, retailers and industries.

In addition to the testimony of Dr. Ileo, the National Oil Jobbers Council called six witnesses who engage in retail sales of home heating oil in New Jersey, New York, Wisconsin, Maine, North Carolina and Maryland. Some of the witnesses operated primarily in urban markets, others primarily in rural markets. The retailers testified that adequate supplies of home heating oil have been available since decontrol and that their business must respond to competitive

conditions. (T.R. 378-513.) The testimony of Barry B. Murphy of Cambridge, Maryland is representative of these witnesses. He testified that he sells less than 2 million gallons of home heating oil annually and that he sells some gasoline, lubricating oils and some hard coal. Most of Mr. Murphy's customers are owners of rural residences. Mr. Murphy testified as follows:

Since I am one of the smallest [marketers] in the area, I have to compete with everybody every way possible. So every way I compete with them. Of course, I do not have large scale advertising budgets. Most of ours is personal contact and a very small advertising budget. (T.R. 486.)

We find that the testimony of Dr. Ileo, the exhibits he introduced, and the testimony of home heating oil marketers provide substantial evidence that workable competition does exist at the wholesale and retail levels of the home heating oil industry. Since this evidence is unrebutted, we find that the wholesale and retail levels of this industry are characterized by workable competition. Accordingly, we further conclude that the conduct of the retailing and

wholesaling sectors of the industry does not, in and of itself, justify the imposition of price or allocation controls.

B. Competition in the Distribution of Home Heating Oil

The level of activity in the No. 2 heating oil industry immediately prior to wholesale and retail distribution is distribution of No. 2 heating oil to wholesalers. Distribution can occur by pipeline or through other forms of transportation, including barges and trucks. In this proceeding, the only allegation of a lack of workable competition at this level of the No. 2 heating oil industry was in pipeline distribution.

Although pipeline distribution was occasionally alluded to by the parties (T.R. 1007-1018), the issue of whether workable competition exists in the distribution of home heating oil by pipelines was not a major topic of discussion at the hearing. The Department of Justice (DOJ) did state that "competitive problems may be present in the pipeline sector of the industry." (Final Brief for DOJ at p. 43.) 20/ However substantial evidence was not introduced with respect to the nature or extent of competition in the distribution of No. 2 heating oil by pipeline and we make no findings as

to the existence of workable competition in this sector of the industry.

C. Competition at the Refining Level of the Home Heating Oil Industry

The major efforts of two of the parties focused on the competitive environment at the refining level of the No. 2 heating oil industry. DOJ and EPTF took diametrically opposed positions concerning the existence of workable competition at the refining level of the home heating oil industry. The Justice Department presented evidence which tended to show that: (1) there are only three relevant geographic markets in the United States for refined petroleum products (T.R. 533-534), (2) each of these markets has many refiners, suggesting the presence of workable competition (T.R. 547-548), (3) concentration ratios 21/ for two of the refining markets are too low to indicate a competitive problem (T.R. 547-548), (4) barriers preventing new firms from entering the industry and actively competing are high but not prohibitive (T.R. 549-550), (5) a number of inter-corporate arrangements or joint ventures exist among refineries but these cooperative arrangements do not, by themselves,

indicate a competitive problem (Final Brief of DOJ at pp. 39-43), and (6) available antitrust remedies are the only appropriate mechanism for resolving any competitive problems that might be found to exist in the petroleum industry. Id. at 52-53.

In contrast to the Justice Department's position, EPTF maintained that competitive problems do exist at the refining level and that these problems significantly impede effective competition. (T.R. 1297-1311.) In summary, the EPTF evidence supported the organization's contention that dozens of joint ventures exist in the industry involving all of the major refining companies. EPTF also contended that these companies have a custom of not being "price chisellers" or engaging in price competition, that the existence of joint ventures creates an incentive not to compete actively, and that concentration ratios for the refining level in fact show that competitive problems exist in certain markets. Ibid. Finally, EPTF maintained that in any case, the strongest evidence concerning competition in the petroleum refining industry is direct evidence concerning the structure and practices of the industry and not the indicators provided by concentration ratios. Ibid.

The Office of Fuels Regulation took a middle position. It argued that the evaluation of evidence concerning the existence or lack of existence of competition at the refining level is irrelevant because "Congress did not intend in the EPAA to give the government a remedy for any non-competitive structure at the refiner tier of the petroleum industry." (Final Brief for OFR at p. 31.) In support of this contention, OFR cited the House Report on the EPAA, which said:

If the current distress of independent refiners, branded independent marketers and non-branded independent marketers is subsequently shown to reflect a permanent shift in competitive advantage in favor of the large integrated oil companies, it may be in order for Congress to consider remedies in the field of tax, import and anti-trust policy. However, the direct allocation program established pursuant to this bill is not for the purpose of permanently reforming the structure of enterprise or incentives in the petroleum industry.

H.R. Rep. No. 93-531 93d Cong., 1st Sess. (1973).

In addition, OFR also argued that "the record of this proceeding . . . does not establish whether the structure of

the refiner tier gives rise to non-competitive behavior in the marketing of home heating oil by refiners." Id. at Footnote 2, p. 22. OFR further argued that evidence concerning the structure of the home heating oil industry is irrelevant since it was not, and cannot be, shown that monopoly prices have been exacted from the marketplace. Id. at p. 37.

1. The Number of Geographic Markets

The DOJ evidence as to the relevant geographic markets for refined petroleum products, including home heating oil, consisted of testimony by Dr. Peter Simon. Dr. Simon is an economist employed by the DOJ. In his testimony, he contended that the markets for refined petroleum products covered large regions of the country and that each region contained enough competitors to indicate the presence of workable competition. (T.R. 533-534, 547-548.) He testified that the following three markets cover the entire United States: (1) the Pacific states, including Alaska, Hawaii, Washington, Oregon, California, Nevada and Arizona, (2) the Mountain states, including Idaho, Montana, Wyoming, Utah and Colorado, and (3) the remainder of the United States. (T.R. 532-534.)

DOJ Exhibit 1 was introduced to present graphically the magnitude and direction of petroleum product movements in the United States in 1974.

According to Dr. Simon the three geographic areas he identified meet the definition of a separate and discrete market because each area is relatively self-contained in that it is:

an area of the country separated from other areas of the country by the cost of transporting the commodity such that it would be potentially possible for all the sellers in that area, if they could act as one seller, to raise the price of the product in that market without incurring shipments from other geographic areas. One factor to be examined in determining if an area is a separate geographic market is whether there are substantial flows of the product into or out of that market. (T.R. 525-526.)

EPTF disagreed with Dr. Simon's analysis. Initially, it introduced an exhibit which defined geographic markets as consisting of individual states. (EPTF Exhibit 14.) This exhibit showed very high concentration ratios for refiners

in most of those markets. Ibid. However, the exhibit ignored product flows among states. This was a crucial omission because information on the actual flow of product from one state to another indicates that a refiner located in one state may be actively competing by shipping his product to the other state. In other words, product flows are an important indication of the geographic area in which refiners can potentially compete with one another without incurring prohibitive transportation costs.

On cross-examination, Mr. George Donkin, an expert witness called by EPTF, conceded that there are no more than four relevant markets for refined petroleum products for purposes of this proceeding. (T.R. 703-709.) His disagreement with Dr. Simon is that he would separate the midwest area from the Atlantic Coast rather than including both regions of the country in a single market. (T.R. 709.)

We find that both the three and four market theories are reasonable and that there is no basis in the record of this proceeding for choosing between them. However, the principal purpose of defining markets is to provide a basis for calculating concentration ratios. Those ratios are in turn used as a

rough indicator of the degree of competition in the market. As the discussion below will indicate, the concentration ratios for the refining level of the No. 2 heating oil industry are not significantly affected by the use of either three or four markets for refined petroleum products.

2. Numbers of Competitors and Concentration Ratios
in Different Geographic Markets

The Department of Justice used its arguments as to the proper definition of geographic markets to formulate two further positions. First, it introduced testimony by Dr. Simon to indicate that a large number of refiners participate in each of the three geographic marketing areas. According to Dr. Simon, 42 refiners are active in the Pacific market, 27 in the Mountain states market, and 100 in the remainder of the country. (T.R. 546.) Dr. Simon also testified that four-firm concentration ratios (consisting of the percent of the market for all refined products accounted for by the four largest firms) generally did not indicate a competitive problem. (T.R. 548.) Dr. Simon's testimony on concentration ratios and the contrasting ratios submitted by EPTF are presented in Table I.

TABLE I

Concentration Ratios in Markets for Refined
Petroleum Products

<u>Position of Justice Department</u>			<u>Position of EPTF</u>		
	4-Firm	8-Firm		4-Firm	8-Firm
<u>Markets</u>	<u>Ratio</u>	<u>Ratio</u>	<u>Markets</u>	<u>Ratio</u>	<u>Ratio</u>
Pacific	51.0	76.2	Pacific	57.8	75.1
Mountain	48.0	75.9	Midwest	43.2	63.6
Rest of Country	32.4	52.0	Mountain	37.5	56.3
			Gulf Coast-		
			Atlantic	34.9	50.4

Sources: T.R. 547; EPTF Exhibit 20.

Dr. Simon testified that the only concentration ratios (see Table I) which could possibly indicate competitive problems were in the Pacific region where "the concentration ratio is sufficiently high to be on the fringe of suggesting a competitive problem, using [one expert's ...] high standard. It presents a moderate possibility of tacit collusion using [another expert's...] standard." (T.R. 548.)

Dr. Simon stated that competitive problems were not indicated in the Mountain States where the four-firm concentration ratio is 48.0 percent. We infer that Dr. Simon would also take the position that, if EPTF's market definition were accepted, the four-firm concentration ratios in the markets defined by EPTF would not indicate any competitive problem except in the Pacific region. This inference is appropriate because the Pacific market in the EPTF analysis was the only market in which the four-firm concentration ratio exceeded 48.0 percent. As stated above, Dr. Simon found that the 48.0 ratio in the mountain states indicated the absence of competitive problems.

The expert testimony introduced by the EPTF differed considerably as to the implications to be drawn from the concentration ratios that appear in Table I. According to Mr. George Donkin, an expert witness for EPTF, both the four-and eight-firm concentration ratios indicate that the refining sector is "highly concentrated." (T.R. 694.) Mr. Donkin further testified that economists can find competitive problems on the basis of the ratios for the markets identified by Dr. Simon as well as for the markets identified by EPTF. (T.R. 1108.)

In general, concentration ratios do not themselves prove the existence or non-existence of workable competition. They may, however, indicate that particular markets have a structure in which competitive problems could well exist and which warrant further study. Those further studies would concentrate on more solid evidence of the manner in which the industry actually operates and on prevailing business practices. This evidence might or might not confirm the indication provided by concentration ratios. Consequently, any findings we would draw in this case from the evidence of concentration ratios alone would not be conclusive in and of itself of the existence or non-existence of competition.

Moreover, in the present case, we do not believe that the concentration ratio evidence is sufficiently strong to lead to any ultimate conclusions as to the probable existence or non-existence of competitive markets in the refining industry. We tend to agree with the position of the Department of Justice that as an abstract proposition a four-firm concentration ratio of 48.0 percent or less would not by itself lead to the conclusion that competition does not exist. However, further evidence as to the structure and customs of the industry has been presented in this proceeding and a proper interpretation of these ratios can not be reached without considering this other evidence together with the concentration ratio.

In addition, the very large geographic markets accepted for purposes of determining concentration ratios are not necessarily good indicators of actual markets for No. 2 heating oil. In a truly competitive market, supplies tend to gravitate to the area in which prices are highest, and as a result prices tend to be relatively equal if transportation costs are minor or relatively similar. In a rough sense, this is how the markets for refined petroleum products were defined in the previous part of this section. However, if the markets for No. 2 heating oil are defined in the broad manner referred

to above, significant shipping cost differences are obviously present among supply locations. For example, if the refineries in Minnesota were to increase their prices for No. 2 heating oil, other refiners as far away as New Hampshire or Texas could in theory decide to compete in the Minnesota market by offering refined petroleum products in that area at lower prices. However, their ability to take this action in the Minnesota market would be affected by the costs of shipping product to Minnesota from New Hampshire, and these shipping costs are likely to be considerably different from the shipping costs to the same point from Texas or from nearby states. In addition, as we will discuss in the next part of this Section, refiners may be disinclined to engage in active competition because of industry custom, mutual interdependence, or the prospect of arranging further, profitable joint ventures.

Consequently, we are willing to accept the uncontested evidence that concentration ratios in the Pacific region do indicate the possibility of competitive problems; but we are not willing to make further findings concerning the existence or non-existence of competitive markets based solely on the evidence submitted in this proceeding concerning concentration ratios.

3. Evidence as to the Structure of the Home Heating
Oil Industry at the Refining Level

At the hearing, EPTF took the position that concentration ratios, discussed above, are a misleading indicator of competition. According to expert witnesses called by EPTF, the following factors are the principal features of the refining industry in the United States:

(1) "Without exception, every firm that is a vertically integrated firm in the petroleum industry is tied together with every other vertically integrated firm in the petroleum industry through literally dozens of joint ventures." (Wilson, T.R. 1300-1301; see also EPTF Exhibit 15.)

(2) "As a matter of fact, the petroleum industry, the oil and gas business, is done through joint ventures. Off-shore licenses are acquired jointly by bidding companies who acquire the property together, explore it, develop it, and produce it together. When it is oil, they jointly own the pipeline gathering system

that brings it ashore. From there it is transported through jointly owned pipelines to refineries and out of the refineries through jointly owned pipelines." (Donkin, T.R. 718-719.)

(3) "The concentration ratio . . . is an approximate inferential device which the economist uses to suggest whether or not there is likely to be independent or interdependent behavior among firms in the industry. That is the only reason we look at it. In the case of the petroleum industry we have direct evidence. . . . We have extensive joint ventures. . . . They are interdependent because they run a large aspect of their business jointly. What is good for one is good for the other. There is no need for a conscious parallelism or a mere agreement to agree." (Wilson, T.R. 1298.)

Dr. Wilson also testified that the crude oil refining industry has an anti-competitive custom that major oil companies are not "price chisellers." He also indicated that what the industry regards as "chiseling" is known to economists as competition, characterized by firms reducing their prices in order to increase their share of the market. (T.R., 1309-1310.)

In addition to the motivation provided by existing joint ventures, Dr. Wilson gave his opinion that firms in the refining industry are motivated to avoid price competition by the possibility that they might enter into highly profitable joint ventures in the future. He testified that existing and potential joint ventures seriously affect the incentive to compete. He presented the following illustration:

I would like to become a joint venturer in your coal gassification deal. And . . . you would like to become a joint venturer in my off-shore oil deal. Are we under the circumstances likely to engage in a serious price war with respect to home heating oil in the mid-Atlantic, going through the trouble and the aggravation of contesting each other in a competitive sense in the home heating oil market if that is going to disrupt relationships which are moving along in a nice direction towards some lucrative joint ventures in other aspects of the industry? (T.R. 1308.)

Dr. Wilson also added that prevailing conditions in the industry make it feasible for refiners to avoid price competition. First, their joint ventures require that "they discuss everything about their operations with each other, from production to product exchanges to transportation." (T.R. 1311.) Furthermore, the companies were said to know one another's refinery capacity, supplies, volume of production and prices. (T.R. 1309-1310.)

The Justice Department argued that Dr. Wilson's testimony was unsupported by concrete evidence. It asserted that he could offer no firm evidence of the existence of the conspiracy he alleges and that he did not describe the "precise mechanism" by which monopoly returns are earned. (Final Brief of DOJ at pp.40-41.) The Justice Department also stated:

Logistically, without overt collusion or at least massive exchanges of price and supply information, it would be extremely difficult for an individual firm or small group of firms to determine what the other members of the group were doing in a particular market. It would also be extremely difficult, if not impossible, for each individual firm to learn what all other refiners, including independents, were supplying to a given market. By Dr. Wilson's own admission over thirty and as many as fifty different vertically integrated refiners, through their participation in joint ventures, are involved in his conspiracy (Wilson, T.R. 1302.) It is difficult to see how the actions of such a large number of firms could be directly coordinated, let alone tacitly coordinated in a geographic market. Until such evidence is forthcoming, it cannot be presumed that joint ventures and pipelines make competition unworkable. Id. at 42-43.

In its brief, OFR took a similar position to that of the Department of Justice. It said that "All the evidence in this proceeding regarding joint ventures, relevant markets,

etc. is of little or no relevance to section 4(b)(1)(F) unless it can be shown that the structure has been used to exact monopoly profits from the marketplace." Final Brief for OFR at p. 37.) OFR also stated that Dr. Wilson "discussed the vertical and horizontal integration of refiners and the numerous joint ventures in which refiners are partners, but failed to tie any of these facts to the marketing of home heating oil." Ibid.

In addition to evidence as to the structure and business practices of the refining level, and the arguments of the parties concerning that evidence, there is evidence in the record concerning barriers to entry into the industry. The testimony of DOJ's expert witness, Dr. Peter Simon, indicates that there are high barriers to entry at the refinery level. He testified that:

[Barriers to entry at the refining level] are probably quite high. The principal environmental regulations, in particular, have raised the cost of building a new refinery by a substantial amount. (T.R. 549.)

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As far as planned de novo entries of major scale refiners, I believe [the Pittston Company . . . refinery in Maine and the Hampton Roads . . . refinery . . . in Virginia] . . . are the only ones in the works. (T.R. 1048.)

The effect of high barriers to entry is that existing refiners need not fear potential competition from firms which do not already operate in the industry.

The EPTF witnesses also testified that the alleged lack of competition at the pipeline distribution level, which was conceded for purposes of this proceeding by the Justice Department (Final Brief for DOJ at p. 43), is related to competition at the refining level. EPTF argues that when a vertically integrated refiner "pays" a high transportation charge to itself, in its dual capacity as a pipeline owner, the transaction has no effect on its overall profitability. As a result, a portion of refinery profits is siphoned off into the pipeline portion of the business. In contrast, when a high fee is paid by an independent refiner (or contemplated by a potential new entrant into the refining business),

it adds to the costs of the product marketed by the refiner to its customers, resulting in a higher market price than would have existed in the absence of the shipping price paid to the pipeline. (Duncan, T.R. 1140-1141, 1143.) Hence, the independent refiner's product is more expensive when it reaches the market; and the potential new entrant must plan for a higher market price. As a result, according to Mr. Duncan, the integrated refiner benefits from the higher prices which its competitors are forced to charge because of the shipping price. Ibid.

As the foregoing summary indicates, the points of view advanced at the hearing with regard to the adequacy of competition at the refining level differed greatly. In order to make a definitive determination as to which view of the industry and its operations is correct, significant empirical data that was not presented in any significant detail would be required. Nevertheless, the issue of the adequacy of competition is at the core of this proceeding, and any recommendation regarding the advisability of new

regulatory initiatives with respect to No. 2 heating oil would be incomplete in the absence of findings on this issue. 22/ As the relevant statutes indicate, competition is indeed critical, and the parties to this proceeding have repeatedly indicated their agreement with this conclusion.

Accordingly, we make the following findings based on the preponderance of the evidence in the record. We are persuaded that the environment in which refiners do business has some characteristics which are not generally present in a workably competitive market. First, as noted above, high barriers to entry pose unusual problems in the refining industry, both because of the investment initially required and in terms of high operating costs. (T.R. 549, 1048, 1140-1143.) Second, each of the major vertically integrated refining companies is engaged in dozens of joint ventures with every other vertically integrated refiner. (T.R. 1300-1301; EPTF Exhibit 15.) Third, in the course of conducting these joint ventures the companies exchange substantial operating information and therefore have an opportunity to utilize that information on a daily basis in a manner which might adversely affect competition. (T.R. 1311.) Fourth, in the normal course of operation the companies are familiar with each other's

prices and have substantial information concerning their competitors' supplies and their quantities of production. (T.R. 1309-1310.) Fifth, the existence of joint ventures in such number and the opportunity for further, highly profitable joint ventures tends to reduce the incentive which might otherwise exist to engage in price competition. (T.R. 1309; 718-719.)

In view of these findings, we consider the evidence which the Department of Justice has presented on "concentration ratios" to fall short of indicating the presence of workable competition. Moreover, we believe that the other evidence regarding characteristics of the industry is more persuasive than the ratios. We accept the view of experts cited by EPTF that when the eight-firm concentration ratios for the different geographic regions of the country are considered, together with direct evidence as to the structure of the industry, serious competitive problems are indicated.

In reaching this conclusion, we note that the record does not contain any evidence that the refiners of home heating fuel do engage in competitive behavior. 23/ None of the parties to this proceeding was restricted in its ability to

present relevant evidence. In fact, the American Petroleum Institute and the Atlantic Richfield Corporation, who might have presented evidence that competition does exist, had been accepted as parties to the proceeding and accorded the right to present material of that nature. These organizations subsequently withdrew from the proceeding for reasons which we find to be wholly unconvincing. 24/ Under the circumstances it would not be unreasonable to infer that neither the API nor ARCO would have been able to offer additional evidence to support the proposition that workable competition does exist among refiners. Accordingly, we have concluded that the preponderance of the evidence submitted at the evidentiary hearing casts very serious doubt as to whether workable competition exists at the refining level.

4. Evidence Concerning the Suitability of Anti-Trust Remedies to Protect Consumers

In the briefs it filed in this proceeding, the Department of Justice took the position that even if the finding were made that workable competition did not exist in the No. 2 heating oil industry, it would nevertheless be inappropriate for the Department of Energy to implement remedial action. (Final

Brief for DOJ pp. 52-53.) According to the DOJ position, if the DOE were to conclude that workable competition did not exist, the only reasonable measure would be for the DOE to refer the matter to the Antitrust Division of the Department of Justice for further analysis. We are not able to accept this position on the basis of the evidence presented at the hearing.

In unrebutted testimony Dr. John Wilson stated that the consumer cannot rely on antitrust enforcement to rectify competitive problems in the refining level of the home heating oil industry in the foreseeable future. (T.R. 1271-1276.) Dr. Wilson reviewed the history of antitrust efforts in the refining industry, and cited the following examples of what he said have been ineffective antitrust efforts: (1) the termination, due to a politically motivated action of Attorney General Jackson during World War II, of a prosecution of the American Petroleum Institute and 22 oil companies; (2) the termination "for national security reasons," of an investigation begun under President Truman; (3) the dismissal under suspicious circumstances of a 1957 case against 29 oil companies charging price fixing during the Suez Canal crisis; (4) the reduction to inactive status of an investigation of

the Colonial Pipeline that had been initiated in 1972; and
(5) the discontinuation of the Trans-Alaska Pipeline investigation by Attorney General Mitchell at the same time that political contributions were being solicited from oil companies.
Ibid. Dr. Wilson then stated that:

Antitrust policy has been singularly ineffective in [the oil]...industry, partly because of its unwieldiness and in part due to the fact that it had been traditionally subordinated to political considerations. (T.R. 1271.)

* * *

Antitrust enforcement is hardly a defense which home heating oil consumers can depend on to provide them with protection or relief from excessive fuel oil prices in the winter of 1978-79 or the remainder of the decade. (T.R. 1275-1276.)

There would appear to be little dispute as to the fact that antitrust remedies which might be applied to the oil industry are very cumbersome, and that long delays are inevitably present in obtaining and analyzing the masses of data required

to pursue an effective antitrust action against a major oil firm. We are therefore not persuaded that the antitrust remedy can provide effective short-term relief for non-competitive conditions that might exist in the No. 2 heating oil industry. Nor are we persuaded by the Department of Justice's claim that the remedy of an antitrust proceeding should be conclusively regarded as the only appropriate mechanism for dealing with non-competitive conditions in the refining industry. Moreover, no evidence was offered by any party to rebut Dr. Wilson's testimony that antitrust remedies have been ineffective in the past when applied to the petroleum industry.

VI. FINDINGS

The evidence submitted in this proceeding indicates that:

- (i) the price for No. 2 heating oil at the refining level subsequent to decontrol has increased at a greater rate than the cost increases refiners have been incurring;
- (ii) that situation is likely to persist in the future;
- (iii) the overcharges refiners are likely to receive in sales of No. 2 heating oil during the period from decontrol to the end of the 1978-1979 heating oil season will be approximately \$321 million;
- (iv) low income families are very seriously affected by increasing fuel oil prices;
- (v) significant doubts have been raised by the evidence in this proceeding that workable competition exists in the refining sector of the industry; and

(vi) antitrust remedies are not likely to be successful in resolving competitive problems in the refining industry.

Despite these findings, we are nevertheless reluctant to conclude firmly that controls are essential in order to achieve the objectives of the EPAA and ensure equitable prices. Although there is some evidence in the record of this proceeding as to the structure of the industry, there are no empirical data in the record as to actual day-to-day operations of the refining industry or the manner in which refiners actually set prices for No. 2 heating oil. In addition, price controls necessarily carry with them certain added costs and inefficiencies that may ultimately be reflected in the prices charged for the controlled products. Furthermore, Section 4(b)(1)(I) of the EPAA contains a preference for avoiding unnecessary interference with market mechanisms. For these reasons we are not willing to conclude that price controls should be implemented immediately without providing a further opportunity for the submission of evidence that workable competition does in fact exist. However, the burden of making that showing should now be on the industry. The particular format in which that showing should be made is discussed in detail in the final Section of this Decision.

VII. RECOMMENDATIONS

1. The Economic Regulatory Administration should give a very high priority to designing and completing a series of studies concerning the existence of competition among oil refiners. The results of these studies should be released to the public no later than September 1, 1979.

The allegations and evidence in the record that petroleum refiners do not engage in active competition have not been rebutted. These charges must therefore be considered very serious. The assumption that competition exists in the heating oil industry was crucial to the FEA decision to decontrol No. 2 heating oil. Even aside from its critical relationship to the original decontrol decision, the absence of data that could resolve serious doubts as to whether workable competition exists in one of the nation's principal industries is a matter of serious concern. Moreover, the DOE should play an important role in resolving this matter in view of the emphasis in the statutes it is responsible for implementing on the priority role of its regulatory

program to "restore and foster competition" in the petroleum industry. (EPAA Section 4(b)(1)(D).)

The studies which we recommend be undertaken by ERA should be carefully designed, adequately funded and purposefully managed to produce meaningful, timely findings. 25/ The gravity of the charges and the financial importance to consumers, particularly the poor, require that unnecessary delay be avoided. We are aware that these studies will be difficult but we are convinced that there is a pressing need to overcome those difficulties.

(a) Study No. 1. should examine the marketing practices and comparative profitability of individual refineries.

This study should accomplish the following objectives: (i) determine the actual marketing areas for individual refineries in order to make adequate determinations as to the number of refiners actively competing in particular markets, (ii) develop accounting guidelines for appropriately allocating costs to individual refineries and products, 26/ (iii) determine the distribution costs which limit the ability of

refineries to engage in price competition in different actual or potential marketing areas, (iv) ascertain profit rates and return on investment for different levels of operation, and (v) determine factors, such as newness of plant and relative labor costs, which would help to explain differences in profits that were not due to competitive problems. High concentration ratios, unusual or supernormal profitability for individual products, refineries or refiners and unexplained failures to compete in potential marketing areas (where distribution costs make active competition feasible) would be among the criteria used to identify competitive problems.

(b) Study No. 2 should concentrate on the degree of competition in wholesaling and retailing of home heating oil. It should collect and analyze data regarding the operation of firms in each relevant market.

The record does not contain any evidence suggesting a lack of workable competition at the wholesale or retail levels of the No. 2 heating oil industry on a national basis. However, the data available to the parties is highly aggregated and does not permit a satisfactory determination of whether

there are local areas of the country dominated by one or by a small number of wholesalers or retailers. Therefore, it is important to gather detailed information on the number of independent firms operating in local markets in order to assure the consumer that prices charged are "equitable."

The ERA Office of Fuels Regulation stated during the course of the hearing that it has undertaken a comprehensive study of marketers and business practices at the retail and wholesale tiers and has urged the assignment of "the highest priority to the prompt and successful completion of this study."

(Final Brief of OFR at p. 52.) We recommend that both this study and the other studies which we are recommending be given that high level of priority.

2. If the prices of No. 2 heating oil at the refinery level continue to exceed costs and if the studies which the ERA conducts indicates that workable competition does not exist, the ERA should conduct formal rulemaking proceedings to determine the nature and extent of the price controls program that should be reimposed.

On the basis of the findings in the Decision we have concluded that if No. 2 heating oil prices increase at a greater rate than costs and if there is no workable competition to restrain the prices of refiners, then "inequitable prices" will be charged. One of the major policy objectives which the Congress directed the DOE to further in the EPAA is the promulgation of a regulatory program to ensure that equitable prices are charged for petroleum products. Moreover, under the circumstances described above other important policy objectives specified in Section 4(b)(1) of the EPAA will also be frustrated. These conditions would in our view necessitate responsive action by the ERA. Since it is unlikely that antitrust remedies would provide a sufficiently effective response over the next several years, it would appear that price controls would provide the most desirable response to the situation.

The price control program need not however mirror the prior programs that were promulgated. New conditions would be present. Consequently the rulemaking hearing that would be convened should focus on the ERA competition studies and the practices of refiners in determining the precise nature and extent of the regulatory response.

3. Even prior to the completion of the studies referred to above the Department of Energy should establish procedures which afford refiners an opportunity to come forward with evidence that workable competition does exist. If sufficient evidence is not supplied by refiners to support the proposition that workable competition exists, the Economic Regulatory Administration should institute formal rulemaking proceedings to determine the nature and extent of the price control program that should be instituted for No. 2 heating oil.

In the prior portions of this Decision we concluded that the evidence taken as a whole raises significant doubts as to whether workable competition exists at the refining level of the No. 2 heating oil industry. If the firm conclusion were reached that workable competition does not prevail then a situation would presently exist in which (i) prices of heating oil subsequent to decontrol have risen substantially

faster than costs; (ii) there is every likelihood that prices will continue to rise at a greater rate than costs in the future; (iii) refiners have already charged consumers hundreds of millions of dollars more for No. 2 heating oil than they would have been permitted to charge under a price control program; and (iv) there is no workably competitive environment to constrain refiners in levying unreasonable prices for No. 2 heating oil in the future.

Under these circumstances we believe that price controls on No. 2 heating oil would be necessary in order to further each of the objectives of Section 4(b)(1) of the Emergency Petroleum Allocation Act and to provide some reasonable measure of assurance that equitable prices will be charged for a product which is a necessity of life for many American families.

In view of the evidence which has already been submitted, we believe that the responsibility should now be placed on the refining industry for resolving the significant doubts that have emerged as to whether it is operating in a workably competitive environment. If the industry fails to do so then it would be both reasonable and appropriate to conclude

that it cannot do so. The evidence taken as a whole should then be formulated into a finding that a workable competitive environment does not exist in the refining industry and the reinstitution of controls on No. 2 heating oil 27/ is necessary to satisfy the objectives of the EPAA.

4. If the aggregate prices refiners charge for No. 2 heating oil exceed the President's Wage and Price Guidelines either on a national or regional level, then the Economic Regulatory Administration should institute formal rulemaking proceedings to determine the appropriate price controls that should be reimposed.

In view of the evidence already adduced at this hearing, if refiners raise their prices for No. 2 heating oil above the levels specified in the President's Guidelines their conduct should be regarded as strong evidence that appropriate price controls are necessary to satisfy the statutory objectives specified in the EPAA. We therefore recommend that the ERA should establish a mechanism for determining compliance with the Guidelines and for instituting formal rulemaking proceedings if the Guidelines are exceeded.

5. The Economic Regulatory Administration should immediately reinstate a program to monitor on a national and regional basis:

- (a) The price of No. 2 heating oil to residential users.
- (b) The price of No. 2 heating oil charged by refiners in sales to non-ultimate and ultimate consumers.
- (c) The gross margins realized by refiners in sales of No. 2 heating oil.
- (d) The product and purchased product costs incurred by refiners.

For the past two heating seasons since decontrol, the ERA has conducted various programs designed to monitor the price of No. 2 heating oil. Although those monitoring systems have not produced information which permits an exact determination of the causes of increases in No. 2 heating oil prices, we nevertheless recommend that they be continued

in modified and reduced form. The alterations to the monitoring program are intended to increase its usefulness in view of information which will be elicited in connection with other recommendations made in this section.

Monitoring of gross margins should be discontinued with respect to the wholesale and retail levels of the industry. In addition, there is no need to monitor prices at the wholesale level. The evidence presented at the hearing leads us to conclude that competitive market forces at these levels are generally adequate to prevent wholesalers and retailers from increasing their prices for home heating oil to non-competitive levels.

However, a different situation exists with regard to the refiner level. Serious questions were presented as to whether workable competition exists in this sector. We therefore recommend that during the impending heating season, the ERA continue to collect data as to the prices which refiners charge in sales of No. 2 heating oil to both non-ultimate and ultimate consumers, the costs refiners incur and the gross margins which they realize in these sales. Those data should be collected on both a national and

regional basis. Regional data would be collected from the ten DOE Regions.

Utilizing the information gained under Recommendation 1, ERA will then be able to disaggregate refiner gross margin data into its individual components - i.e., non-product costs and profits. Since the data will be in an unprecedentedly accurate and detailed form, the precise source of any increase in gross margins would be readily determined. In addition, the data will indicate the other costs (product and purchased product costs) that refiners incur over the 1978-79 heating season and provide a comprehensive system for ascertaining the causes of increases in No. 2 heating oil prices at the refiner level.

We also recommend that the ERA continue to monitor on a national and regional basis the overall price of No. 2 heating oil to residential users. Changes in the residential prices for heating oil can then be compared to changes in the prices of other consumer goods and alternative energy sources for space heating in particular. Regional data as to the overall price of No. 2 heating oil will enable the DOE to discern any significant disparities which might occur among different areas of the United States.

However, we do not believe that it would be useful for ERA to retain the refiner index which was used in the most recent monitoring system. In general, the parties at the hearing agreed that the refiner index was not an adequate measure of reasonable prices. As OFR pointed out, the limitations in the methodology used to develop the refiner index seriously restrict the use of that mechanism in analyzing prices at the refiner level.

6. The Economic Regulatory Administration should take the following actions to assist low-income consumers in securing adequate supplies of heating oil and coping with the higher costs of fuel:

- (a) Continue the set-aside program for middle distillates established during the 1977-78 heating season.
- (b) Design and implement a program to make adequate supplies of heating oil available to low-income households at reasonable prices. All necessary actions should be taken to ensure that the program is in place no later than January 15, 1979.

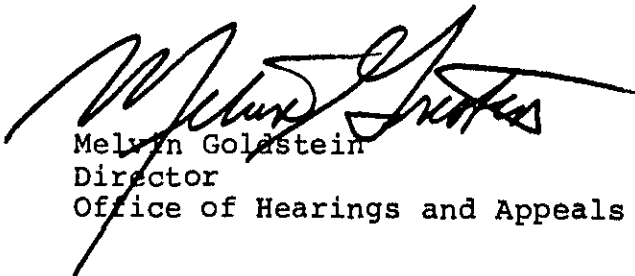
- (c) Undertake a study to obtain detailed information regarding the impact of rising heating oil prices on low-income users on a national and local basis.

The evidence presented at the hearing indicated that low-income users are experiencing special difficulties in meeting increasing costs of home heating oil. Although these difficulties do not necessarily result from inequitable prices for No. 2 heating oil, the Department of Energy, the primary government entity responsible for coordinating the energy policy matters, has an affirmative obligation to reduce serious financial hardships to the maximum extent possible under existing legislation. 28/ We therefore recommend that the Economic Regulatory Administration take the actions described below to address the problems low-income users of No. 2 heating oil are experiencing.

The ERA should continue the set-aside procedures for middle distillates which were established during the 1977-78 heating season. 42 Fed. Reg. 59488 (November 18, 1977). Although these procedures have not been utilized extensively they should continue to be available as a means of ensuring that

adequate supplies of heating oil can be provided to consumers to meet emergency and hardship situations. State energy offices are most capable of responding quickly to hardship situations that arise, and these agencies should continue to be primarily responsible for administering any set-aside program directed at individual residential consumers.

In addition, the ERA should immediately convene a series of conferences in various parts of the country to obtain concrete suggestions of further measures that could be taken to respond to problems the low income consumer might experience in obtaining fuel oil at a reasonable and equitable price. A concentrated effort should be made to involve all segments of the petroleum industry as well as consumer advocates and representatives of state and local governments in the conferences. The ERA should devote sufficient staff and financial resources to the project to ensure that a program is formulated and in place no later than January 15, 1979.



Melvin Goldstein
Director
Office of Hearings and Appeals

NOV 20 1978

FOOTNOTES

1/ Section 4(b)(1) of the EPAA sets forth a number of objectives which the regulatory program covering petroleum products was designed to attain. These objectives will be referred to frequently throughout the text of this Decision and are quoted below:

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration of, and production or extraction of -

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

15 U.S.C. Section 753(b)(1).

2/ A list of the Petitions to Intervene received by the Office of Hearings and Appeals is provided in Appendix B at the end of the Decision.

3/ A list of all the Exhibits submitted at the August 1978 evidentiary hearing and the testimony of each witness is provided in Appendices D and E at the end of this Decision.

4/ William Gillespie was the Chief of the Branch of Price, Cost, and Marketing of the Energy Data Interpretation,

of the Energy Information Administration of the Department of Energy. Andrew Drance is an analyst with the Office of Fuels Regulation. Their testimony appears at T.R. 92-197 and 226-247, respectively.

5/ Citations to the transcriptional record of the evidentiary hearing (T.R.) and to exhibits submitted by the parties at the hearing (Exhibits) refer to materials which have been admitted into the record of this proceeding during the course of the August 1978 evidentiary hearing. The transcript of the evidentiary hearing, exhibits introduced at the hearing, and all other material submitted in connection with this proceeding are available for public inspection at the Public Docket Room of the Office of Hearings and Appeals in Washington, D.C.

6/ Wholesaling was defined at the hearing as sales of No. 2 heating oil by non-refiner reselling firms to other resellers and retailers. Retailing encompasses all non-refiner sales to ultimate consumers.

7/ Paul Burke is the Program Manager of the Office of Fuels Regulation's Industry Regional Operations. His testimony can be found at T.R. 334-375.

8/ A detailed discussion of the general nature of the marketing of No. 2 heating oil occurs at (T.R. 111-119.)

9/ The costs of firms operating in the heating oil industry are comprised of two general categories. The first category, product costs, are costs which a firm incurs in buying the product which it then refines or simply resells. The second category consists of non-product costs. These are costs which a firm incurs as a result of its refining or marketing activities.

10/ For an additional discussion of the benchmark methodology, see T.R. 248-251.

11/ For a further discussion of the refiner index methodology, see T.R. 228-235.

12/ Energy Policy and Conservation Act of 1975, 42 U.S.C. Section 401 (amending 15 U.S.C. Section 8 (1973)).

13/ A number of Exhibits presented by OFR consisted of factual representations regarding No. 2 heating oil prices (based on statistical surveys) that were not challenged by

other parties at the evidentiary hearing. Accordingly, we have accepted these factual representations as correct. They are presented in OFR Exhibits 1-3 and 7.

14/ The primary constraint involved in using the refiner index as a measure of increased costs is the absence of accurate non-product cost data. Data regarding the portion of refiners' non-product costs which is allocated to No. 2 heating oil was not available to the parties in this proceeding. Therefore, the index methodology estimated non-product costs attributable to No. 2 heating oil on the basis of the non-product costs which refiners incurred for controlled refined products. However, we are unable to discern on the basis of this hearing record whether the production and marketing of No. 2 heating oil generates more or less non-product costs at the refining level than other refined products.

Another limitation in the refiner index methodology is that it allocated non-product costs attributable to No. 2 heating oil based on sales volume rather than production volumes. Testimony presented at the hearing indicated that the use of sales volumes instead of production volumes might tend to understate non-product costs for No. 2 heating oil (T.R. 134, 942.)

15/ In contrast to the EPTF presentation, OFR presented an analysis which compared prices and costs at the refiner level during the second winter after decontrol - i.e., the 1977-78 heating season. Using the same methodology described above, this analysis simulated the average maximum lawful price that would have prevailed had controls remained in effect. The OFR analysis utilized June 1977 as the base month for computing price and cost increases. This evidence indicated that No. 2 heating oil prices at the refiner level slightly exceeded the index in three months during the 1977-8 7 heating season, but for the remaining months remained substantially below the corresponding index price. (p. 64 supra.) The OFR analysis also indicated that prices at the refiner level did not increase significantly above increased costs since June 1977. When the results of this analysis are combined with the EPTF study, it is evident that the major portion of price increases for home heating oil to residential users and price increases at the refiner level occurred during the first heating season (1976-77) after the exemption of the product from controls. (Table B at p. 53.) It is also possible that at least some portion of the price increases during the 1976-77 heating season resulted from the industry adjusting to the lifting of controls. For

instance, firms in the industry may have increased their gross sales margins after decontrol because of a perceived need (not recognized under controls) for a higher rate of return. In the alternative, or in addition, firms may have increased their margins in order to recover profits which were foreclosed to them under controls. Also, the winter of 1976-77 was abnormally cold and the increases in demand for No. 2 heating oil could have placed substantial upward pressure on the price of the product.

16/ As we have explained previously, the term "overcharges" was used at the hearing to connote revenues that would not have been realized by refiners if controls had remained in effect.

17/ \$21 million (overcharges during 1976-77 heating season) plus \$172 million (overcharges during 1977-78 heating season) plus \$138 million (projected overcharges for 1978-79 heating season) amounts to \$331 million (total cumulative overcharges)

18/ CCH Federal Energy Guidelines Par. 10,610 at p. 10,619-9 (1974).

19/ We accept the testimony of Dr. John Wilson on this point. (T.R. 1284-8.) See also the testimony of Dr. Michael Ileo (T.R. 868-9.) Although Dr. Michael Ileo testified that there are substantial price elasticities of demand among gas, electricity and oil as residential heating fuels (see OFR Exhibits 20-22), we accept instead the rebuttal testimony of Dr. Wilson that the elasticities in OFR Exhibit 22 are long-run in nature, are based on a time period of lower prices whose elasticities may have been different from those of the higher prices which now prevail, and are not indicative of "a viable short-run option for consumers faced with excessive home heating oil prices." (T.R. 1284-85.)

20/ Also see Investigation of Common Carrier Pipelines, Ex Parte No. 308 (Sub-No. 1) 43 FR 7017 (Feb. 17, 1978).

21/ A concentration ratio is the percentage of sales in a market accounted for by a specified number of firms. For example, a four-firm concentration ratio is the percent of sales accounted for by the largest four firms in a particular market.

22/ As stated above OFR has pointed to the portion of H.R. Rep. No. 95-531 93rd Cong., 1st Sess. (1973) which states that it was not the purpose of the allocation program to reform the structure or incentives of the petroleum industry. We are not persuaded, however, that the House Report to which OFR alluded precludes a determination of pricing or allocation matters on the basis of a finding that workable competition does not exist. First, the statutory language of Section 12(f) and Section 4(b)(1) relates in a direct and express manner to DOE regulatory responsibilities. In our view these statutory provisions require that a determination be made as to whether price controls are necessary in order to assure equitable pricing of home heating oil. For the reasons previously discussed, that determination depends on whether prices have been set in a workably competitive environment. Second, Section 12(d)(2) of the EPAA required the amendment exempting middle distillates from price regulations to be supported by a finding that

competition and market forces are adequate to protect consumers and that exempting such oil or refined product category will not result in inequitable prices for any class of users of such oil or product. (Section 12(d)(1)(B).)

The fact that the Congress required such a finding as a condition of deregulating a product strongly supports the proposition that we may reimpose controls on the basis of a finding that market forces are now inadequate to protect consumers from inequitable prices. Finally, the language which OFR cited does not appear in the Conference Report and there is no evidence that the argument which OFR advances was accepted by the Conference Managers.

23/ Six witnesses produced by the National Oil Jobbers Council testified as to the existence of competition at the wholesale level of the industry. This evidence does not have any substantial bearing on whether or not refining level marketing practices are workably competitive. (T.R. 378-513.)

24/ According to the statement filed, the American Petroleum Institute withdrew for the following reasons: (1) reservations of members of API as to whether competitive business concerns should disclose proprietary information regarding costs and prices, and (2) the "ad hoc" manner in which rules for the proceeding have been developed without complying with either Section 501 of the Department of Energy Organization Act or the Administrative Procedures. We find the first reason the API cites to be without merit because it

would not be necessary for a firm to disclose current cost and price information in order to demonstrate the presence of competition and there would have been many ways to participate constructively without divulging proprietary information. The second is wholly falacious because this procedure has permitted all parties the maximum possible opportunity to present evidence and arguments and API did not even suggest how the procedures that were ultimately adopted would adversely affect it.

The Atlantic Richfield Company stated that it was withdrawing from the proceeding because it reviewed the analysis of home heating oil market conditions presented by OFR and was willing to let that position be maintained by OFR.

25/ As stated in the recommendation, significant results of the studies should be released to the public no later than September 1, 1979. It is most important that these analyses be available in time to affect a decision concerning the need for further regulatory action in the 1979-1980 heating season. However, we recognize that the data collection and analysis we are recommending will require assembling a skillful analytical team, whose work may not be entirely completed by September 1, 1979. Consequently, the analytical effort should be expected to continue beyond that date in order to produce definitive findings.

26/ Guidelines should permit costs to be computed separately for individual refined products and permit allocations among the refinery, distribution, wholesaling and retailing operations of vertically integrated companies. The Guidelines should also enable refinery profits to be measured without undue attention to bookkeeping entries, which may be affected by discretionary business or tax treatment considerations.

27/ This hearing focused upon possible regulatory action with respect to No. 2 heating oil. However, the evidence submitted indicates that refiners can adjust their slates of refined products to emphasize one product over another. The interchangeability of No. 2 diesel fuel and No. 2 heating oil is even greater than for refined products in general, since diesel can be burned as heating fuel and the chemical differences between the products are so minor that one product can be transformed into the other after distillation is concluded. (T.R. 524-5, 987-93.) Consequently, regulation of No. 2 heating oil could well produce shortages of heating oil. If controls are reimposed on heating oil, similar action would therefore be required for diesel fuel.

28/ Section 4(b)(1)(A) of the EPAA directs the DOE to promote "public health, safety and welfare (including maintenance of residential heating for individual homes, apartments, and similar occupied dwelling units) and the equitable distribution of refined petroleum products among ... all users."

APPENDIX A

Chronology of Events

A chronology of significant events during the course of these administrative proceedings appears below. All documents or decisions filed in connection with the proceeding are referred to specifically in the accompanying Index and are available for public inspection and copying at the Public Docket Room of the Office of Hearings and Appeals in Washington, D.C., Room B-120, 2000 M Street, N.W.

April 18, 1978	OHA announces adoption of interim rules of procedure. 43 Fed. Reg. 17393 (April 24, 1978)
May 15, 1978	Deadline for filing comments regarding interim rules. Comments were received from seventeen interested parties.
May 15, 1978	Petitions to Intervene submitted by thirteen organizations.
May 31, 1978	OHA issues final rules of procedure. 43 Fed. Reg. 24588 (June 6, 1978).
June 2, 1978	OHA issues a Decision and Order granting party status to three petitioners. <u>Energy Policy Task Force of the Consumer Federation of America, et al.</u> , 1 DOE Par. 82,565 (June 2, 1978).
June 6, 1978	OHA holds a pre-hearing conference to discuss remaining Petitions to Intervene. (Transcript on record).
June 9, 1978	OHA issues a Decision and Order with respect to remaining Petitions to Intervene. <u>American Petroleum Refiners Association, et al.</u> , 1 DOE Par. _____ (June 9, 1978).
June 30, 1978	Statements of Factual Position filed by each party. OFR Report on No. 2 heating oil prices during 1977-78 heating season published.

July 10, 1978	Atlantic Richfield Company and the American Petroleum Institute withdraw from proceeding.
July 14, 1978	OHA issues Decision and Order establishing specific procedures for the evidentiary hearing.
July 14, 1978 through July 18, 1978	Responses to Statements of Factual Position and OFR Report submitted by all parties.
August 7, 1978	OHA holds a pre-hearing conference with parties to discuss various motions submitted by the parties with respect to the procedural format of the evidentiary hearing. (Transcript on record).
August 9, 1978	Parties submit lists of witnesses and documents which will be presented at the evidentiary hearing.
August 10, 1978	OHA issues a Proposed Statement of the issues to be considered at the hearing.
August 10, 1978 and August 14, 1978	Depositions held with all parties in attendance. (Transcript on record).
August 14, 1978	OHA holds a pre-hearing conference on the Proposed Statement of Issues. (Transcript on record).
August 18, 1978	OHA holds a final pre-hearing conference to clarify certain procedural matters. (Transcript on record).
August 21, 1978 through August 29, 1978	Evidentiary Hearing. See Index for a list of exhibits submitted at the hearing. All exhibits and a transcript of the entire hearing are available in the Public Docket Room.
September 13, 1978	Written comments due from all interested persons who were not parties to the proceeding. Comments were received from Chevron, Inc., Exxon, Inc., the Amoco Oil Company, and Toby Moffett, Congressman from the 6th District of Connecticut.

September 18, 1978 Summation briefs submitted by all parties.
September 29, 1978 Responses to summation briefs filed.
October 4, 1978 Concluding arguments presented by each
party.

APPENDIX B

Petitions to Intervene

Petitions to Intervene in the August 1978 proceeding were received from the following organizations:

- (1) Assembly of the State of New York
 - (a) Committee on Ways and Means
 - (b) Standing Committee on Consumer Affairs and Protection
 - (c) Office of Legislative Oversight and Analysis
- (2) Energy Policy Task Force of the Consumer Federation of America
- (3) American Petroleum Institute
- (4) American Petroleum Refiners Association
- (5) National Oil Jobbers Council
- (6) State of Wisconsin Department of Administration/
Office of State Planning and Energy
- (7) State of Wisconsin Public Service Commission
- (8) Antitrust Division of the Department of Justice
- (9) Atlantic Richfield Company
- (10) Phillips Petroleum Company
- (11) Amoco Oil Company
- (12) Mobil Oil Corporation
- (13) Honorable Toby Moffett (Congressman from the 6th
District of Connecticut)

APPENDIX C

List of Preliminary Motions

Motion to submit direct written testimony	DOJ	June 23, 1978
Motion to prohibit the American Petroleum Institute from withdrawing from the Hearing	EPTF	June 30, 1978
Motion to grant the Atlantic Richfield Company to file out of time	EPTF	July 7, 1978
Motion to Withdraw	Arco	July 10, 1978
Motion to Withdraw	API	July 10, 1978
Motion of NOJC to protest the withdrawal of API and Arco	NOJC	July 13, 1978
Motion to compel compliance with Rule 5 of the Rules of Procedure	EPTF	July 14, 1978
Comments on above Motion	OFR	July 25, 1978
Motion to Prohibit Withdrawal of Arco	EPTF	July 17, 1978
Motion for Reconsideration of Decision concerning presumptions	EPTF	July 21, 1978
Motion for Leave to Take Depositions	EPTF	August 3, 1978
Motion regarding Rule Governing Scope of Cross-Examination	EPTF	August 8, 1978
Motion to Adopt Rule on Cross-Examination	EPTF	August 9, 1978
Motion by DOJ with respect to the Separate Direct Testimony and Cross-Examination of a limited number of expert witnesses	DOJ	August 11, 1978
Motion for Leave to Limit Scope of Direct and Cross-Examination of Certain Witnesses	NOJC	August 14, 1978

APPENDIX D

Testimony

OFR Witnesses

William C. Gillespie	T.R. 92-192; 802-814; 217-226; 899-955; 573-580
George Hall	T.R. 193-217
Andrew H. Drance, Jr.	T.R. 226-247; 899-955; 289-311; 814-828
Lesley R. Byers	T.R. 248-287
Dr. Michael J. Ileo	T.R. 311-334; 829-896
Paul Burke	T.R. 334-375
Scott Sitzler	T.R. 1263-1268

DOJ Witnesses

Dr. Peter Simon	T.R. 514-569; 956-1097
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National Oil Jobbers Council Witnesses

John B. Wade, Jr.	T.R. 378-414
Arthur P. Motzkin	T.R. 414-429
Bernard A. Pitman	T.R. 429-448
Kenneth R. Gifford	T.R. 448-465
June Mallard	T.R. 466-483
Barry Murphy	T.R. 484-513

EPTF Witnesses

William F. Haddad	T.R. 581-636
Eunice S. Grier	T.R. 636-657

George Donkin

T.R. 657-725; 1097-1110;
1133-1231

Anthony Joseph Maggiore

T.R. 725-761; 763-785

Robert E. Ramsdell

T.R. 1110-1130;
1232-1262

John Wilson

T.R. 1268-1359

APPENDIX E

Exhibits

Submitted by OFR:

- OFR Exhibit 1- Increase in National Average Residential Heating Oil Price: June 1976 through April 1978
- OFR Exhibit 2- Estimated Components of Residential Heating Oil Price Increases from June 1976 to June 1977 and April 1978
- OFR Exhibit 3- Increases in Refiners' Crude, Operating and Purchased Product Costs and Wholesale Prices: June 1976
- OFR Exhibit 4- Increases in Nonrefiner's Gross Margins for Residential Heating Oil Compared to the Consumer Price Index
- OFR Exhibit 5- Historical Review of Press Releases Indicating the Exceeding of FEA's Index Prices
- OFR Exhibit 6- Weekly Heating Oil Price Report for April 21, 1977
- OFR Exhibit 7- Residential Heating Oil Prices on National and Regional Basis
- OFR Exhibit 8- Distillate Fuel Oil Stocks
- OFR Exhibit 9- Distillate Fuel Oil Stocks
- OFR Exhibit 10-Projected Domestic Petroleum Product Demand Assuming no Price Increase due to Exemption
- OFR Exhibit 11-U.S. Petroleum Supply Analysis
- OFR Exhibit 12-Refinery Yields for the United States
- OFR Exhibit 13-Refiner Index and Actual U.S. Average Prices to Non-ultimate Consumers
- OFR Exhibit 14-Comparison of Actual Retail Gross Margins to Benchmarks

- OFR Exhibit 15-Comparison of Actual Wholesale Gross Margins to Benchmarks
- OFR Exhibit 16-Refiner Overcharge Calculation for April 1978 (May 1976 Base Scenario)
- OFR Exhibit 17-Average Size of Fuel Marketers According to Assets and Sales
- OFR Exhibit 18-Pre-Income Tax Rates of Return on Assets, Various Industry Sectors, 1970-1976
- OFR Exhibit 19-Pre-Income Tax Rates of Return on Equity, Various Industry Sectors, 1970-1976
- OFR Exhibit 20-Percentage Distribution of Heating Fuel in all Occupied Housing Units in the U.S., 1940-1975
- OFR Exhibit 21-Percentage Distribution of Heating Fuels in Newly Constructed One-Family Homes in the U.S., 1966-1976
- OFR Exhibit 22-Summary of Studies on the Long-run Own-price and Cross Price Elasticities of the Residential Demand for Heating Fuel
- OFR Exhibit 23-Residential Fuel Price Indices
- OFR Exhibit 24-Projection of Refiners' Prices and Costs for 1978-79 Heating Season
- OFR Exhibit 25-Refiners' Guideline Prices for No. 2 Heating Oil Sales to Non-Ultimate Consumers
- OFR Exhibit 26-Projection of Refiner Overcharges
- Submitted by DOJ:
- DOJ Exhibit 1- Total Petroleum Products Movement throughout the United States
- DOJ Exhibit 2- Petroleum Administration for Defense (PAD) Districts
- DOJ Exhibit 3- Geographic Divisions of the United States

DOJ Exhibit 4- Department of Energy Regional Structure

DOJ Exhibit 5- Movement of Crude Petroleum, Refined Petroleum Products, and Natural Gas Liquids

Submitted by EPTF:

EPTF Exhibit 1-Increases in Nonrefiners' Gross Margins for Residential Heating Oil Compared to the Consumer Price Index

EPTF Exhibit 2-Federal Energy Administration, Post-Exemption Monitoring of Middle Distillate Prices, Adoption of Proposed Monitoring System

EPTF Exhibit 3-No. 2 Heating Oil Monitoring System-Refiners Guideline Prices for Sales to Non-Ultimate Customers (May 1976 Base Scenario)

EPTF Exhibit 4-Middle Distillate Prices - Analysis of Post-Exemption Monitoring System

EPTF Exhibit 5-Heating Oil Prices to other than Ultimate Consumers

EPTF Exhibit 6-Unrecouped Costs for Refined Products for 30 Largest Refiners

EPTF Exhibit 7-Transcript of the Joint Hearing of the New York State Assembly Standing Committee on Consumer Affairs and Protection and the New York Assembly Ways and Means Committee (July 27, 1978; New York, New York)

EPTF Exhibit 8-High Fuel Oil Prices: The Impact on Low-Income Households

EPTF Exhibit 9-Changes in Refiners' Gross Margins Adjusted for Changes in Nonproduct Costs (June 1978-February 1978)

EPTF Exhibit 10-Comparison of Refiners' Gross Margins June 1977-February 1978

- EPTF Exhibit 11-Refiners No. 2 Home Heating Oil Prices for Sales to Non-Ultimate Consumers Since Decontrol
- EPTF Exhibit 12-Computation of Entitlement Benefits to be Applied to Purchased Product Costs Category on EPTF Exhibit 3
- EPTF Exhibit 13-Volume of No. 2 Heating Oil Imported by Refiners as a Percent of all No. 2 Heating Oil Purchased by Refiners: May 1976 through March 1978
- EPTF Exhibit 14-Concentration Levels in Petroleum Refining Markets
- EPTF Exhibit 15-Appendix B Selected Data on Joint Ventures in the Petroleum Industry
- EPTF Exhibit 16-Gross Domestic Oil Production and Producing Oil Wells Jointly Owned by Standard Oil of Ohio together with Largest Partners
- EPTF Exhibit 17-Joint Refiner Activities in Foreign Nations
- EPTF Exhibit 18-Fuel Oil Consumer Energy Information Report
- EPTF Exhibit 19-Summary of Refinery Output, Demand and Interregional Flows of Middle Distillates 1977
- EPTF Exhibit 20-Summary of Concentration Levels in Relevant Markets in the Domestic Refining Industry
- EPTF Exhibit 21-Data Base July 1, 1978 to April 1, 1978
Trend Extended May 1, 1978 to June 30, 1979
- EPTF Exhibit 22-Consumer Price Index Trend Line Analysis
Data Base June 30, 1976 to April 30, 1978
Trend Extended May 1, 1978 to June 30, 1979
- EPTF Exhibit 23-Refiners Actual U.S. Price to Non-Ultimate Consumers, Trend Line Analysis, Data Base June 30, 1976 to April 30, 1978 Trend Extended May 1, 1978 to June 30, 1979

EPTF Exhibit 24-Recalculated to Reflect Trended Refiners' Price
Increases

EPTF Exhibit 25-Testimony of Dr. John W. Wilson

EPTF Exhibit 26-Recent Mergers Between Petroleum Companies
and Firms in other Industries

EPTF Exhibit 27-Recent Major Petroleum Industry Mergers

EPTF Exhibit 28-Diversification in the Energy Industries
by 18 Major Integrated Petroleum Companies,
Ranked by Assets, as of 1973

APPENDIX F

Decisions of the Office of Hearings and Appeals

- April 21, 1978 Consumer Federation of America, 1 DOE Par. 82,566 (April 27, 1978)
Office of Hearings and Appeals granted special funding to EPTF to enable it to participate in the August 1978 evidentiary hearing.
- April 18, 1978 Notice of Interim Rules of Procedure, 43 Fed. Reg. 17393 (April 24, 1978)

The Office of Hearings and Appeals issued interim rules of procedure to govern the conduct of the evidentiary hearing.
- June 2, 1978 Energy Policy Task Force of the Consumer Federal of America, et al., 1 DOE Par. 82,565 (June 2, 1978)

The Office of Hearings and Appeals designated EPTF, API, and ARCO as parties to the proceeding.
- May 31, 1978 Notice of Final Rules of Procedure, 43 Fed. Reg. 25488 (June 6, 1978)

Final rules of procedure for the evidentiary hearing were set forth by the Office of Hearings and Appeals.
- June 9, 1978 American Petroleum Refiners Association, et al., 1 DOE Par. _____ (June 9, 1978)

The Office of Hearings and Appeals decided on the remaining Petitions to Intervene. ARCO and NOJC were accorded part status.
- July 14, 1978 No. 2 (Home) Heating Oil (Rules of Procedure) 2 DOE Par. 82,518 (July 14, 1978)

Specific procedures to govern the conduct of the evidentiary hearing were delineated by the Office of Hearings and Appeals.

July 14, 1978

The Honorable Toby Moffett; the State of Wisconsin, 2 DOE Par. 82,516 (July 14, 1978)

The Office of Hearings and Appeals determined that the Petitions to Intervene submitted by Congressman Moffett and the State of Wisconsin should be consolidated with EPTF for purposes of representation at the August 1978 evidentiary hearing.

August 10, 1978

No. 2 (Home) Heating Oil, Proposed Decision and Order, Case No. DEH-0022 (August 10, 1978)

A preliminary list of the issues to be considered at the evidentiary hearing was prepared by the Office of Hearings and Appeals.

August 15, 1978

No. 2 (Home) Heating Oil (Statement of Issues) 2 DOE Par. _____ (August 15, 1978)

The Office of Hearings and Appeals stated the issues that would be considered at the evidentiary hearing.

APPENDIX G

Party Submissions

Statements of Factual Position submitted by all Parties on June 30, 1974.

OFR Report entitled "Analysis of No. 2 Heating Oil Prices for the 1977-78 Heating Season published on June 30, 1978.

Replies to Statements of Factual Position and OFR Reports submitted by all parties on July 14, 1978.

Lists of Witness and Documents submitted by all parties between August 8, 1978 and August 21, 1978.

Final Briefs submitted by all parties on September 18, 1978.

Replies to final briefs submitted by EPTF, OFR, and DOJ on September 29, 1978.

APPENDIX H

Written Comments from Non-Participants

Chevron U.S.A., Inc.

Exxon Company U.S.A., Inc.

Amoco Oil Company

Honorable Toby Moffett (Congressman from the 6th District of Connecticut)

APPENDIX I

Other Relevant Material

"Findings and Views Concerning the Exemption of Middle Distillates from the Mandatory Allocation and Price Regulations" issued by the Federal Energy Administration on June 15, 1976.